

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 542. 185

EL PASO BRICK COMPANY, APPELLANT,

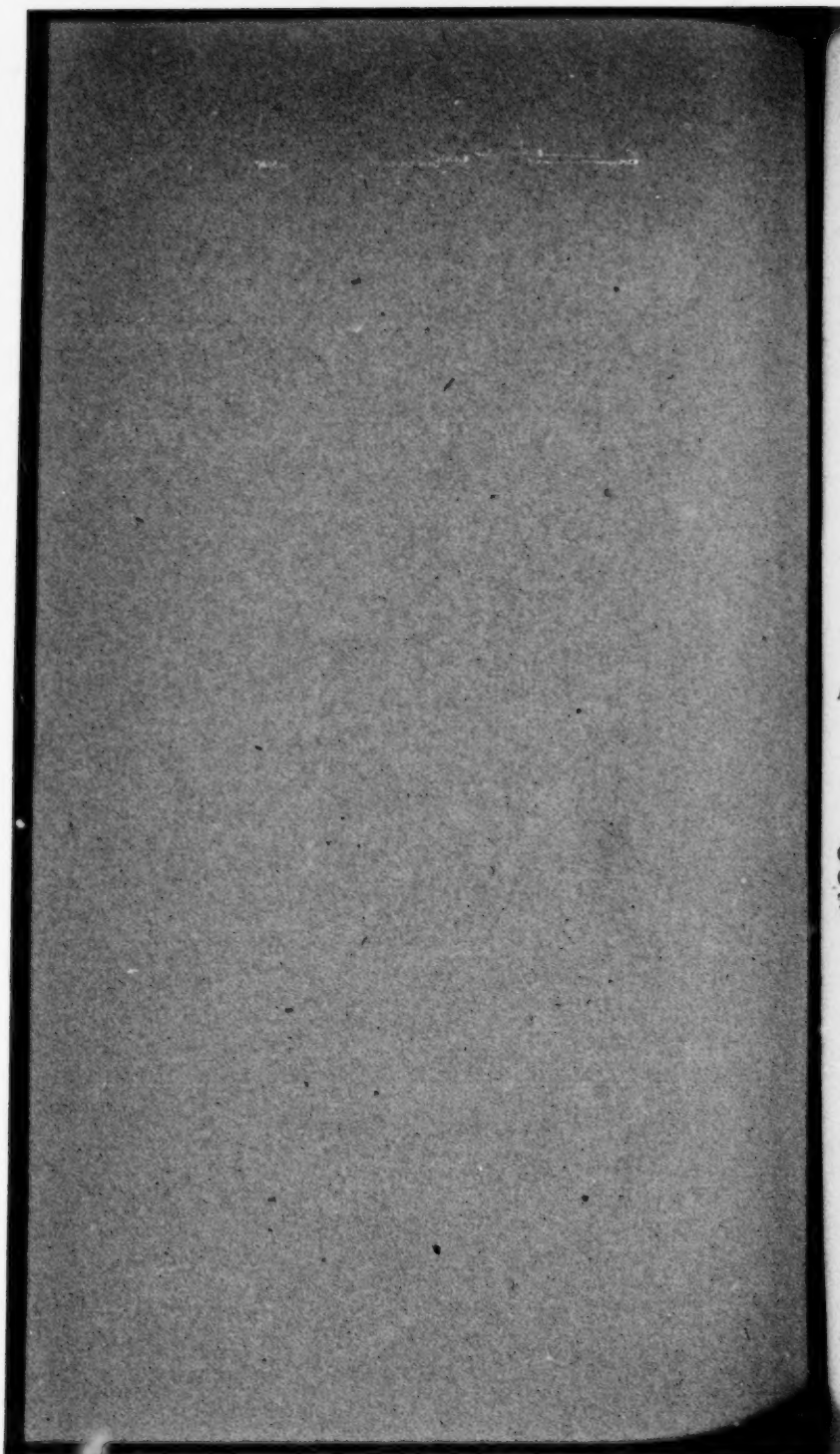
vs.

JOHN H. McKNIGHT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

FILED FEBRUARY 6, 1913.

(23,047)



(23,047)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 542.

EL PASO BRICK COMPANY, APPELLANT,

vs.

JOHN H. McKNIGHT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

INDEX.

	Original.	Print
Citation and service	a	1
Caption	1	1
Transcript from the district court for the county of Dona Ana, Ter- ritory of New Mexico	2	2
Complaint	2	2
Answer	10	6
Exhibit A—Location notice, "Aluminum" claim	15	9
Location notice, "Hortense" claim	17	10
Location notice, "International" claim	20	11
B—Amended location, "International" claim	21	12
Amended location, "International" claim	23	13
Amended location, "Hortense" claim	25	14
Amended location, "Aluminum" claim	28	16
Reply	31	17
Stipulation as to facts	34	18
Exhibit C—Receiver's receipt	36	20
D—Letter, Commissioner to Register and Receiver, April 10, 1906	38	20
E—Decision of Assistant Secretary Pierce, Sep- tember 9, 1908	42	23

	Original.	Print
Exhibit S—Adverse claim and protest of John H. McKnight...	50	28
Exhibit 1—Location notice, "Agnes" claim	60	33
2—Location notice, "Lulu" claim	61	34
3—Location notice, "Lynch" claim.....	62	35
4—Location notice, "Tiptop" claim.....	64	36
5—Location notice, "Aurora" claim.....	65	37
6—Amended notice, "Agnes" claim	67	38
7—Amended notice, "Lulu" claim	69	39
D—Location notice, "Lulu" claim	71	41
E—Location notice, "Agnes" claim.....	72	41
F—Amended notice, "Lulu" claim.....	73	43
G—Amended notice, "Agnes" claim	75	44
H—Location notice, "Lynch" claim	77	45
I—Location notice, "Aurora" claim.....	78	46
J—Location notice, "Tiptop" claim	80	46
N—Deed, McKnight to Los Angeles Pressed Brick Co., November 24, 1906.....	81	47
O—Deed, Los Angeles Pressed Brick Co. to McKnight, October 20, 1908.....	83	49
Q—Proof of labor, International, Aluminum, and Hor- tense placers	86	51
R—Proof of labor, Aluminum placer group.....	88	52
No. 1—Location notice, "Hortense" claim	90	53
A—Location notice, "Aluminum" claim.....	93	55
No. 1a—Amended notice, "Hortense" claim.....	95	56
Amended notice, "Aluminum" claim	97	58
No. 5—Tabulated statement of work done on the Lulu, Agnes, Tiptop, and Aurora claims by J. H. McKnight <i>et al.</i> from 1905 to 1908, inclusive.	100	60
No. 7—Articles of incorporation of The Los Angeles Pressed Brick Co.....	104	63
Judge's certificate to transcript of testimony.....	110	66
Special findings requested by defendant	111	67
Special findings requested by plaintiff.....	118	71
Findings of fact by the court.....	140	84
Conclusions of law by the court	164	98
Judgment.....	155	99
Motion to reopen and vacate judgment	169	101
Order setting aside findings and judgment, &c.....	172	103
Motion for appeal.....	175	104
Order allowing appeal, &c.....	176	105
Appeal bond.....	177	106
Citation	181	108
Praecipe for record.....	183	109
Praecipe to tax costs.....	185	110
Stipulation as to record on appeal, &c.....	187	111
Motion to extend time to settle bill of exceptions.....	189	112
Order extending time to settle bill of exceptions.....	190	113
Order to send up original maps, &c.....	192	114
Stipulation as to record on appeal, &c.....	194	115
Praecipe for addition to record.....	195	116
Clerk's certificate	197	116
Assignment of errors.....	199	117

INDEX.

III

	Original	Print
Motion for a resetting.....	210	124
Order admitting E. S. Ives.....	212	125
Order for continuance.....	212	125
Stipulation to correct errors in record.....	213	125
Certified copy of opinion of Assistant Secretary of the Interior in <i>Ex parte</i> Stock Oil Co.....	214	126
Order taking cause under advisement.....	228	134
Stipulation as to value.....	229	135
Affidavit of value.....	229	135
Judgment.....	230	136
Order fixing amount of supersedeas bond.....	234	138
Motion for rehearing.....	235	139
Order denying motion for rehearing.....	235	139
Order as to statement of facts.....	236	139
Findings of fact made by the court.....	237	140
Motion for appeal, &c.....	260	154
Order granting appeal, &c.....	261	155
Supersedeas bond.....	262	155
Assignment of errors.....	265	157
Precipe for record.....	269	160
Opinion.....	271	160
Clerk's certificate.....	291	173

C
i
a
a
v
l
c
s
t
c
u

J
u
o
a
t
h
P

L
o
a
J
P
o

2
o
w
a
85

a United States of America to John H. McKnight, Appellee,
Greeting:

You are hereby commanded and admonished to be and appear in the Supreme Court of the United States sixty (60) days from and after the date of this citation, pursuant to an appeal duly prayed for and granted by the Supreme Court of the Territory of New Mexico, wherein El Paso Brick Company was appellant and you were appellee, to show cause, if any there be, why the judgment and decree rendered against the said El Paso Brick Company, appellant, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this the 2d day of January, A. D. 1912.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM H. POPE,

Chief Justice of the Supreme Court of New Mexico.

We, the undersigned Attorneys, for the plaintiff and appellee John H. McKnight, in the cause mentioned in the foregoing citation, hereby acknowledge that we have received this day service of of a copy of said citation above set out, which was delivered to us, and we hereby accept and acknowledge due service thereof on us this day as Attorneys for plaintiff and appellee in said cause, and hereby enter the appearance of said John H. McKnight in the Supreme Court of the United States.

Dated this 12th day of January, 1912.

WALLACE & WADE,

EUGENE S. IVES,

Attorneys for Plaintiff and Appellee.

Las Cruces, N. M., and Tucson, Arizona.

1 Be it remembered, that heretofore, on to-wit, on the seventeenth day of July, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a certain cause therein pending, entitled, John H. McKnight, Appellee, vs. El Paso Brick Company, a corporation, Appellant, numbered 1403, briefs of which said transcript of record were and are in the following words and figures, to-wit:

2 Be it remembered, That on the 2nd day of January, A. D. 1909, there was docketed by the clerk of the District Court of the Third Judicial District of the Territory of New Mexico, within and for the County of Dona Ana, a certain cause of which a complaint was filed, which said complaint is in words and figures as follows, to-wit:

"In the Third Judicial District Court of the Territory of New Mexico, Sitting within and for the County of Dona Ana.

No. 2849.

JOHN H. MCKNIGHT, Plaintiff.

vs.

EL PASO BRICK COMPANY, a Corporation, Defendant.

Complaint.

The plaintiff above named complains of the above named defendant and alleges and shows:

(1) That the plaintiff is a citizen of the United States over the age of 21 years and a resident of Los Angeles, in the State of California.

(2) That the defendant is a corporation organized and existing under the laws of the State of Texas, and doing business within the Territory of New Mexico.

(3) That the plaintiff on the 12th day of September, A. D. 1908, by reason of discoveries theretofore by him made within the premises hereinafter described of valuable mineral deposits upon unappropriated mineral lands of the United States subject to location and purchase and of divers locations thereof made and maintained by him and his grantors under and by virtue of a full compliance with the laws of the United States and of the Territory of New Mexico and within the local rules and customs of miners applicable to the location upon the public domain of the United States of Placer Mining Claims, and was and still is entitled to the possession of the following described premises and tracts of land situated all in Section 9 of Tp. 29 South of Range 4 East, and in the County of Dona Ana and Territory of New Mexico, to-wit:

The "Agnes" claim described as follows:

Beginning at the S. W. corner of claim identical with the S. W. corner of lot No. 3 Section 9 Tp. 29 S. R. 4 east, a monument of stones, where notice is posted, whence the S. W. corner of the original location bears S. 6 deg. West 5.00 chains distant. Thence East on the south boundary of Sec. 9 20.00 chains to the N. E. corner of the S. W. quarter of S. E. quarter of Sec. 9 the S. E. corner of claim monument of stone. Thence north to right bank of Rio Grande a "stake." Thence with meander of Rio Grande northwesterly to intersection with the south boundary of N. half of fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 the N. E. corner of a claim post. Thence westerly along south boundary of N. half of S. E. quarter Sec. 9 17.28-100 chains to the west boundary of lot No. 3 Sec. 9 of the N. W. corner of claim, monument of stones; whence the N. W. corner of original claim bears N. 36 deg. west 8.70 chains distant. Thence south 10.00 chains to the place of beginning, containing 18 1-2 acres,

4 more or less, being that part of lot No. 3 Sec. 9 corresponding to fractional S. half of the N. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east.

The "Lulu" claim described as follows:

Beginning at the north west corner of the N. E. quarter of N. E. quarter of S. W. quarter of Section 9 Tp. 29 S. R. 4 east N. M. P. M. a monument of stone. Thence east 18 25.100 chains, to right bank of Rio Grande a post, the N. E. corner. Thence S. E.-ly with meander of Rio Grande to North intersection of dividing line bet. the E. and W. half of the N. W. quarter of the S. E. quarter of Sec. 9—a post. Thence south along said dividing line bet. east and west halves of the N. W. quarter of the S. E. quarter of Sec. 9 to S. E. corner of N. W. quarter of N. W. 4 S. E. quarter of Sec. 9, the S. E. corner of claim—a monument of stones. Thence west along south boundary of N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 10.00 chs. Thence W. along S. boundary of N. E. quarter N. E. chs. Thence W. along S. boundary of N. E. quarter N. E. quarter S. W. quarter Sec. 9 10 chs. to S. W. cor. of claim a monument of stones. Thence north along west boundary of N. E. quarter of N. E. quarter of Sec. 9 10.00 chs. to place of beginning. Comprising the N. E. quarter of the S. W. quarter and that portion of lot 3 being fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east, containing 19 12-100 acres more or less. This notice is posted at N. W. corner of claim, whence the S. W. corner of the original location bears S. 40 deg. E. 60 lks. distant and N. W. cor. of original location bears N. 2 deg. west 10.20 chains distant.

The "Lynch" claim described as follows:

5 Beginning at quarter section corner between sections 9 and 16 Tp. 29 S. R. 4 east, the south west corner of claim, monument of stones. Thence north 20.00 chs. to N. W. cor. identical with N. W. corner of lot No. 4, monument of stones. Thence east on north boundary of lot No. 1—10.00 chs. to N. E. cor. monument of stones. Thence south 20.00 chs. to line bet. sections 9 and 16 the south east corner, a monument of stones where this notice is posted. Thence west along Section line 10.00 chs. to south-west corner, the place of beginning, being that portion of lot No. 4 corresponding to the W. half of the S. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east. Containing 20 acres.

The "Tip Top" claim described as follows:

Beginning at a monument of stones the S. E. cor. of claim identical with the N. E. cor. of N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 S. R. 4 east. Thence north 20.00 chs. to the N. E. corner, a monument of stones, identical with the N. E. cor. of that portion of lot No. 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9. Thence west 10.00 chs. to the N. W. cor. of claim, a monument of stone. Thence south 20.00 chs. to the S. W. cor. of claim, a monument of stones, where this notice is posted. Thence east along section line between 9 and 16, 10.00 chs. to place of beginning, containing 20 acres being that portion of Lot No. 4

of Sec. 9 Tp. 29 S. R. 4 east corresponding to east half of S. W. quarter of Sec. 9 Tp. 29 S. Range 4 east.

The "Aurora" claim described as follows:

Beginning at the N. E. cor. of the N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 S. R. 4 east, being the S. W. corner of claim a monument of stone, where this notice is posted.

6 Thence north 20.00 chs. to north boundary of lot No. 4

Sec. 9 the N. W. cor. of claim a monument of stones.

Thence east 15.00 chs. to right bank of Rio Grande, north east corner of claim, a post. Thence southerly with meander of right

bank of Rio Grande along east boundary of lot No. 4 Sec. 9 to meander corner on right bank of Rio Grande between section 9

and 16, to the south east corner, a post. Thence west along section

line 11 25.100 chs. to the S. W. corner place of begin-ing. Containing 18 60.100 acres, being that portion of lot No. 4 lying between the east boundary of that portion of lot 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east and the Rio Grande.

(4) That the defendant, afterwards, to-wit, on the day and year last aforesaid, entered into and upon said premises and unlawfully withheld from the plaintiff the possession thereof to his damage in the sum of \$100.00.

(5) That on or about the 25th day of November, A. D. 1908, the defendant filed in the United States Land Office at Las Cruces, New Mexico, an application for United States Mineral Patent for the Aluminum Group of Placer Mining Claims, (so called) consisting of the "International," The "Hortense," and the "Aluminum" Placer Claims and caused the Register of said land office to give notice of said application for patent by publication as required by law.

(6) That in and by said application for patent the defendant wrongfully set up and alleged that it was and is the owner and in the possession of the said group of Placer Mining Claims which includes the tracts of land and premises hereinabove described.

7 (7) That the plaintiff, on or about the 30th day of December, A. D. 1908, and during the 60 days period of publication of the notice of application for patent by the defendant upon said group of Placer Claims, filed in the said land office, under oath, a protest and adverse claim against said application and for said hereinabove described premises in due form and showing the nature, extent, and boundaries of the adverse claim of the plaintiff and thereupon further proceedings on said application in said land office were and are stayed to await the determination by a court of competent jurisdiction of the right of possession to the hereinabove described premises and the rights of the respective parties therein and thereto and to that end the plaintiff brings this suit, the period of 30 days not having elapsed since the filing of the said protest and adverse claim.

And the plaintiff on information and belief further alleges that said "Hortense" and "Aluminum" Placer Claims are void and of no legal effect by reason of the failure of the defendants and its

grantors at all times prior to the location by the plaintiff of his said claims to discover any mineral within the limits of said "Hortense" or "Aluminum" Claims and by reason of the failure of the defendants and its grantors to conform its and their said claims or either of them, in the location thereof, to the public surveys of the United States and the rectangular subdivisions thereof as near as practicable; and further alleges that if said "Hortense" and "Aluminum" Placer Claims ever had any validity or legal existence the defendants and its grantors failed to do or perform or cause to be done or performed thereupon or for the benefit thereof or during or for the years 1904 or 1905 and each of said years, the annual labor and

assessment work or improvements required by law in order to avoid a forfeiture thereof and thereby and because of such failure forfeited any rights they might have had in said claims and each of them and did not resume possession of the work upon the same at any time prior to the acquirement by the plaintiff and his grantors of the premises here-above described.

The plaintiff therefore prays judgment and relief against the defendant:

(1) That the plaintiff is the owner and lawfully entitled to the possession of the hereinabove described premises and that he do have possession thereof.

(2) That he is entitled to have his title thereto and the possession thereof quieted and confirmed against the adverse claims of the defendant: and

(3) That he have such other and further relief as to the court shall seem meet and just.

(Signed)

EDWARD C. WADE,

Attorney for Plaintiff, Las Cruces, New Mexico.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

John H. McKnight, of lawful age, being first duly sworn, deposes and says: that he is the plaintiff in the above entitled action and that he has read the foregoing complaint and understands the same;

that the same is true to his knowledge save as to the matters and things therein stated on information and belief and as to those matters and things he believes them to be true.

(Signed)

JOHN H. MCKNIGHT.

Subscribed and sworn to before me this 14 day of December A. D. 1908.

(Signed)

P. MORENO,

Notary Public, Dona Ana County, New Mexico.

Which said complaint is endorsed upon the back in words and figures as follows, to-wit:

No. 2849. In the District Court in and for the County of Dona Ana. John H. McKnight, Plaintiff, vs. El Paso Brick Company, Def. Complaint. Third Judicial District Court, County of Dona Ana. Filed in my office this 2nd day of Jan. 1909. Wm. E. Martin, Clerk, by John Lemon, Deputy. Edward C. Wade, Las Cruces, New Mexico, Attorney for Plaintiff.

10 And afterwards, to-wit: on the 30th day of January, A. D. 1909, there was filed by the Clerk the defendant's answer in said cause, which answer is in words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico for Dona Ana County.

No. 2849.

JOHN H. McKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendant.

Answer.

The defendant above named for answer unto the complaint herein says:

First. That he has no knowledge or information as to whether plaintiff is a citizen of the United States and over the age of Twenty-one years, and, for the purpose of requiring strict proof of the complaint to that effect, it denies the same.

Second. It admits that defendant is a corporation organized and existing under the laws of the State of Texas and doing business within the Territory of New Mexico.

Third. It denies that the plaintiff on the 12th day of September, A. D. 1908, or at any other time, was or now is entitled to the possession of the property described in paragraph three of the plaintiff's complaint, or any portion thereof, and denies that the plaintiff or any grantors of the plaintiff ever made any valid locations of the property therein described, or ever complied with the laws of the

11 United States or the laws of the Territory of New Mexico, or that any rules and customs applicable to the location upon the public domain of the United States of the mining claims, lands* and premises in said paragraph of said complaint described as by the said plaintiff in said paragraph alleged.

Fourth. It admits that the defendant is in the possession of the premises described in said complaint, but it denies that it is unlawfully holding from the plaintiff such possession, and denies that the plaintiff has been in any way damaged by the defendant's possession thereof.

Fifth. It admits that it, the said defendant, filed in the United States Land Office at Las Cruces, New Mexico, an application for United States mineral patent for the Aluminum group of placer mining claims, consisting of the International, Hortense and Aluminum placer mining claims, and caused the Register of said Land Office to give notice of such application as required by law as alleged by plaintiff in paragraph five of said complaint.

Sixth. It denies that it, the said defendant, has wrongfully set up or alleged that it was and is the owner and in the possession on said group of placer mining claims as in paragraph six of said complaint alleged, and admits that said group of placer mining claims

for which defendant so made application for patent, included some portion of the tracts of land and premises in paragraph three of said complaint described, and alleges that it is not informed as to exactly what portion of the same is included within the said group of placer mining claims, for which defendant has, as aforesaid, so made application for patent, but, upon information and belief, denies that all of the same are so included.

12 Seventh. Defendant has no knowledge of the plaintiff ever having filed in the United States Land Office in Las Cruces, New Mexico, any protest or adverse claim in due form as alleged in paragraph seven of plaintiff's complaint against the said application for patent so made by the defendant before said Land Office for said Aluminum group of placer mining claims and for the premises described in said complaint, or any portion thereof, showing either the nature, extent or boundaries of any adverse claim made by the plaintiff, or of any proceedings being stayed in said land office upon this defendant's application for said patent on account thereof, and, upon information and belief, denies that any such adverse claim or protest has been so filed by the said plaintiff, and that such proceedings have been stayed on account thereof, and alleges that, in the event any alleged protest or adverse claim has been filed by the said plaintiff in said Land Office against the said application for patent of this defendant, the same is not in due form of law and was not filed in accordance with the law and is null and of no effect.

Eighth. This defendant denies that the Aluminum and Hortense placer mining claims or any other claims included within its said application are void and of no legal effect by reason of the failure of defendant or its grantors, prior to the location of said claim, to discover any minerals within the limits of the same, or any one thereof, or by reason of the failure of defendants or its grantors to conform said claims or either of them in the location thereof to the public surveys of the United States and the rectangular subdivisions thereof as near as practical, but alleges that each and all of said claims and the locations thereof were duly and lawfully made, and in all things conformed to the laws of the United States; it

13 denies that this defendant or its grantors failed to do or performed or cause to be done or performed upon said mining claims, or for the benefit thereof, during and the years of 1904 and 1905, and each of said years, the annual labor and assessment work or improvements required by law in order to avoid a forfeiture thereby, and that this defendant ever forfeited any rights it had in said claims or either thereof in any way, and denies that defendant ever failed to resume possession upon such claims, or either thereof, or at any time when such resumption was necessary for the maintenance of its rights thereto.

Ninth. This defendant denies each and every allegation contained in said complaint not herein expressly by this defendant admitted to be true, and denies that the plaintiff is entitled to the relief or any part thereof by it prayed for, or to any relief whatsoever.

Tenth. The defendant alleges that at the time when the plaintiff alleges that he was entitled to any portion of the premises contained within said Aluminum placer mining claims, to-wit, on the 12th day

of September, A. D. 1908, and for several years prior thereto before the assertion by plaintiff of any right or claim to any portion thereof, the land now contained in said Aluminum group of placer mining claims and each thereof was embraced within valid mining locations duly and lawfully made under and in accordance with the laws of the United States, the Territory of New Mexico and the local rules and customs of miners applicable to the location upon the public domain of the United States placer mining claims, copies of which are hereto attached as Exhibit A, and as such made a part of this

14 answer, and this defendant had become and was and now is the owner thereof as against all persons but the United States of America, which said location notices were duly and lawfully amended by this defendant in accordance with copies of amendatory location notices which are hereto attached as Exhibit "B" to this answer, and made a part hereof, and this defendant now claims, holds and owns all of said Aluminum group of placer mining claims, and each claim constituting the same, and under and by virtue of said original and amended location notices, and by virtue of defendant and its grantors having at all times done and performed all things required by law of this defendant and its grantors in order to claim, hold and own the same, and that said plaintiff is entitled to the possession of none of the same or any part thereof.

The defendant, therefore, prays judgment and relief against said plaintiff as follows:

(1) That the defendant is the owner and lawfully entitled to the lands, premises and real estate described in said original and amended location notices as against the plaintiff and all other persons whomsoever.

(2) That it is entitled to have its title thereto quitted and confirmed against the adverse claims of the plaintiff.

(3) That it have such other and further relief as to the court may seem meet and proper.

(Signed)

HAWKINS & FRANKLIN,

Attorneys for Defendant.

P. O. Address, El Paso, Texas.

15 STATE OF TEXAS,

County of El Paso, ss:

W. F. Robinson, being first duly sworn, deposes and says that he is the President of the El Paso Brick Company, the defendant named in the above entitled action; that he has read the foregoing instrument and understands the same, and that the same is true of his own knowledge, save as to the matters and things therein stated on information and belief and — to those matters and things he believes them to be true.

(Signed)

W. F. ROBINSON.

Sworn to and subscribed before me, this the 29th day of January, A. D. 1909.

W. B. WARE,

[SEAL.]

Notary Public, El Paso County, Tex.

"EXHIBIT A."

Location Notice.

"Aluminum."

Notice is hereby given that we, E. Hewit Rodgers, Edward Rodgers, Eb. Rodgers, W. F. Robinson, B. Leibman, H. G. Ross, W. J. Harris, James H. White, citizens of the United States, have this fifth day of December, A. D. 1900, discovered a valuable placer deposit consisting of aluminum, iron, kaolin, fire clay and manganese within the limits of the following described of unsurveyed public lands of the United States, being the southern portion of Dona Ana County, Territory of New Mexico, west of the Rio Grande above the Southern Pacific Railroad bridge.

16 By virtue of such discovery, we have located and hereby claim the same, containing one hundred and sixty acres.

Said claim is hereby named the "Aluminum Placer Claim."

This claim is marked upon the ground as follows: At the southeast of said tract, about 2,200 feet north of the north boundary line of Mexico, and about 1,800 feet west of the Southern Pacific railroad bridge, we have placed a stake in a mound of rock (Marked No. 1 S. E. corner) from which a culvert under the S. P. Ry. bears northeasterly 635 feet distant; thence west 1000 feet to a stake in mound of rock (Marked No. 2) on a small hill on south side of Cañon; thence northwesterly 2,600 feet to stake in mound of rock in gulch southwest of old incline shaft (Marked No. 3 S. W. corner); thence northeasterly 2,400 feet to stake in mound of rock on eastern slope of hill at S. P. R. R. fence, about 60 feet northerly from telegraph pole marked "1290." Said stake marked "No. 4"; thence southeasterly parallel with the S. P. R. R. 4,000 feet to stake monument No. 1 and place of beginning.

This notice is posted at stake and mound marked "No. 1" at southeast corner. Dated and posted on the ground this 5th day of December, 1900.

E. HEWIT RODGERS,
EDWARD RODGERS,
EB. RODGERS,
W. F. ROBINSON,
B. LEIBMAN,
W. J. HARRIS,
H. G. ROSS,
JAMES H. WHITE,

Locators.

Witness to the location:

L. H. DAVIS.

Filed for record this 10 day of January A. D. 1901, at 8:40 o'clock A. M.

ISIDORO ARMIJO,
Recorder.
By CELSO C. AMADOR,
Deputy.

"EXHIBIT A."

*Location Notice.**Hortense Placer Claim.*

Notice is hereby given that we, E. Hewitt Rodgers, Edward Rodgers, Eb. Rodgers, A. F. Rodgers, E. C. Lemen, A. G. Ross, W. F. Robinson and James H. White, the undersigned citizens of the United States, have this 31st day of March, 1902, located, and do hereby locate, in compliance of the Mining Laws of the United States, 157.36 acres of valuable placer deposits consisting of aluminum, iron, kaolin, fire clay, shale and manganese, within the limits of the following described tract of unsurveyed public lands of the United States, being the southern portion of Dona Ana County, Territory of New Mexico, and situated on the right or south bank of the Rio Grande about four miles westerly from El Paso, Texas, bounded and described as follows:

Commencing at corner No. 1, a rock mound and corner
 18 post, upon which a true copy of this notice is posted, said corner being situated 70 feet northerly from the center line of the El Paso & Southwestern Railroad at Engineer's station No. 11199 x 70. The above corner being also at or near the NW corner of the Aluminum Placer Claim; thence N. 82 deg. 22 min. W. 850 feet to corner No. 2, a rock mound and post; thence S. 67 deg. W. 811 feet to corner No. 3, a rock mound and post situated 100 feet northerly from Engineer's station 11184 x 20, of the said El Paso and Southwestern Railroad; thence south 62 deg. 05 min. W. 1170 feet to corner No. 4, a rock mound and post situated 111 feet northerly from center line of said Railroad at Engineer's station 1172 x 50; thence N. 16 deg. 15 min. W., 515 feet to corner No. 5, a rock mound and post situated 152 feet southerly from center line of New Southern Pacific Railroad at Engineer's station 220 x 30; thence N. 2 deg. 37 min. W. 900 feet to corner No. 6, a rock mound and post situated 18 feet from right-of-way line (South side) of Southern Pacific Railroad; thence north 37 deg. 10 min. E., 800 feet to corner No. 7, a rock mound and post situated 10 feet southerly from said R. of W. line; thence N. 51 deg. 06 min. E., 1450 feet to corner No. 8, a rock mound and post on said R. of W. line (South side); thence N. 62 deg. 10 min. E., 960 feet to corner No. 9, a rock mound and post; thence S. 71 deg. 10 min. E., 881 feet to corner No. 10, a rock mound and post; thence S. 51 deg. 29 min. E., 308 feet to corner No. 11, a rock mound and post, situated on south line of said right-of-way line, and being also the N. E. corner of the Aluminum Placer Claim; thence S. 18 deg. 36 min. W., 2280.2 to corner No. 1 and place of beginning. From corner No. 9 above mentioned monument No. 3, on the international Boundary line bears S. 51 deg. 15 min. W., about 2 1-2 miles distant, and a mountain knob bears from the same corner N.
 19 19 deg. 40 min. E., about — miles distant.

All bearings given are magnetic. All corners are rock

mounds about three feet high with 2 x 3 post in center marked with name of claim and No. of corner. The name of this claim is to be the Hortense Mining Claim and contains 157.36 acres. Located and staked March 31st, 1902.

E. HEWIT RODGERS,
EDWARD RODGERS,
EB. RODGERS,
A. F. RODGERS,
E. C. LEMEN,
H. G. ROSS,
W. F. ROBINSON,
JAMES H. WHITE,

Locators.

Witness:

A. G. BLAKE.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

Filed for record in my office this 30th day of April, A. D. 1902, at 9:00 A. M., and duly recorded in Book of Mining Claims No. 8 at page 25, records of Dona Ana County, New Mexico.

ISIDORO ARMIJO,

Probate Clerk and ex-Officio Recorder

Dona Ana County, New Mexico.

20

EXHIBIT "A."

Notice of Location.

International Placer Mine.

Notice is hereby given, to all whom it may concern, that Noyes Rand, James H. White, Parker Burnham, Charles F. Slosson, G. Norvell Rand, Eddy Burnham, Jesse M. Ellis, citizens of the United States, have this day located under the Revised Statutes of the United States, Chapter Six, Title Thirty-two, the following described Placer Mining Ground, viz: One Hundred and forty acres of Land situate in the extreme southeast corner of the County of Dona Ana, Territory of New Mexico, bounded as follows: Beginning at the point of intersection of the International Boundary line between the United States and Mexico with the southwest bank of the Rio Grande; thence northerly and along said bank of Rio Grande about twenty-one hundred feet to the west end of Southern Pacific Railway Bridge over Rio Grande; thence westerly and at right angles with the foregoing line, three thousand feet; thence southerly and at right angles with the foregoing line about twenty-one hundred feet to the point of its intersection with the said International Boundary Line; thence easterly and along said International Boundary Line about three thousand feet to the place of beginning. This claim is located for mineral bearing shale, aluminum, fire clay and

manganese and iron, situated in — Mining District, Dona Ana County, Territory of New Mexico.

This claim shall be known as the "International Placer Mining Claim" and we intend to work the same in accordance with
21 the local customs and rules of miners in said mining district.

EDDY BURNHAM.
JESSE M. ELLIS.
NOYES RAND.
JAMES H. WHITE.
PARKER BURNHAM.
CHAS. F. SLOSSON.
G. NORVELL RAND.

Dated on the ground this the 8th day of February 1897. Filed for record February 8th, 1897, at 2:30 o'clock P. M.

Recorded February 9th, 1897, at 11:30 o'clock A. M.

JOSE R. LUCERO.

Recorder,

By E. A. RUDISILL,

Deputy.

"EXHIBIT B."

Amended Location.

Brickland, International Placer.

Whereas, Jesse M. Ellis, Charles F. Slosson, G. Norvell Rand, Noyes Rand, James H. White, Parker Burnham, Eddy Burnham, did on the 8th day of February, A. D. 1897, locate the International Placer Claim in Brickland Mining District, County of Dona Ana, N. M., and on the 9th day of February, 1897, did cause a copy of the notice of such location to be recorded in the office of the Recorder of said County on Page 543 of Book No. 6 of Mining Location Records.

22 Now, in order to more definitely describe the metes and bounds of said mine by courses and distances and especially reserving all the rights *these* amended location, the present owners of said mine do make this amended location of said mine, and does describe, establish and claim the same as follows, to-wit:

Beginning at the southeast corner of said claim, whence the International Boundary monument bears west $382\frac{1}{2}$ feet, said S. E. cor. is on the right bank of the Rio Grande Limestone 24 x 8 x 6 ins. set in the ground; thence along the right bank of said river N. 9 deg. 06 min. E. 1200 feet to corner No. 2 Limestone 24 x 8 x 4 inches set in the ground. Thence N. 3 deg. 50 min. E. 770.7 feet to corner No. 3 Limestone 24 x 8 x 6 inches set in the ground. Thence leave said river bank and go along S. P. right-of-way line N. 54 deg. 35 min. W. 180 feet to corner No. 4 Limestone 30 x 10 x 4 inches set in the ground. Thence west 1549.7 feet to S. E. corner of Aluminum Placer Claim, same course in all 2620.4 feet to corner

No. 5 also S. W. corner of Aluminum Limestone 24 x 18 x 8 inches; thence south 120 deg. 34 min. W. 2210.8 feet to corner No. 6 x on rock; thence east along the International Boundary Line 3000 feet to the beginning.

Survey made, monuments erected and stakes set by W. W. Jones, Deputy Mineral Surveyor, this 22nd day of May, A. D. 1903.

This claim shall be known as the International Placer Mine.

Dated on the ground this 1 day of July, 1903.

23

EL PASO BRICK COMPANY,
JAMES H. WHITE,
W. F. ROBINSON,
E. H. RODGERS,
H. G. ROSS,
EDWARD RODGERS,
W. J. HARRIS,
LEIGHT CLARK,
JNO. R. MCFIE,

Locators.

Witness:

Filed for record July 3rd, 1903, at 7.50 o'clock A. M.

ISIDORO ARMIJO,

Recorder,

By C. ARMIJO, *Deputy.*

"EXHIBIT B."

Amended Location Notice of the International Placer Mining Claim.

Know all men by these presents, That, whereas Noyes Rand, James H. White, Parker Burnham, Charles F. Slosson, G. Norvel Rand, Eddy Burnham, and Jesse M. Ellis, did on the 8th day of February, A. D. 1897, locate the International Placer Mining Claim, in Brickland Mining District in the County of Dona Ana, Territory of New Mexico, having heretofore discovered valuable mineral deposits within the confines of such mining claim, and did on the 8th day of February, A. D. 1897, post a notice of such location in a conspicuous place upon said claim, and did thereafter and at 2:30 o'clock P. M., on the 9th day of February, A. D. 1897, cause a copy

of such location notice to be recorded in the office of the
24 Recorder of the said County of Dona Ana, at page 543 of Book 6 of Mining Location Notices, and did and performed all other acts necessary to constitute a valid location of a placer mining claim under the laws of the United States and Territory of New Mexico, and,

Whereas, the undersigned, the El Paso Brick Company, a corporation organized under the laws of and a citizen of the State of Texas and authorized to do business in the Territory of New Mexico, is now the owner by mesne conveyances of the said Mining Claim

and all of the rights, title and interest of the original locators therein and in the ground covered thereby and the mineral therein contained.

Now, then, the undersigned, the El Paso Brick Company, for the purpose of making the surface boundaries of said mining claim conform to the lines of the subsequent public land surveys of the United States, and to more fully comply with the Statutes in such cases made and provided and especially reserving all and waiving none of the rights acquired under and by virtue of such original location and mesne conveyances to the undersigned, and claiming any and all the rights which the undersigned may or can acquire under and by virtue of said original location, does hereby make this amendatory location of said International Placer Mining Claim, and does hereby locate and claim by way of said amendment the following described placer mineral ground and mining claim, to be known as said International Placer Mining Claim, which is situated in Brickland Mining District in Dona Ana County, Territory of New Mexico, viz:

All of Lot Number Two (2) of fractional section fifteen (15) Township Twenty-Nine (29) South, Range Four (4) East, 25 New Mexico, Principal Meridian, said Lot Number Two (2) containing Forty-Four and fifty-seven one hundredths (44.57) acres; also Lots Numbers One (1) and Two (2) of Section Sixteen (16), said Township and Range, containing Forty-four and sixty-five one hundredths (44.65) acres, also the Southeast Quarter of Northeast Quarter of said Section Sixteen (16) of said Township and Range, containing in the aggregate One Hundred and Thirty-nine and twenty-two one hundredths (139.22) acres, all of which contains valuable deposits of minerals. From the southeast corner of said International Mining Claim the center of the International Boundary Monument No. 1 between the United States and Mexico, bears west two hundred and seventy-three and twenty-four one-hundredths (273.24) feet,

Signed, dated and posted on the ground, this the 18th day of September, A. D. 1908.

EL PASO BRICK COMPANY,
By W. F. ROBINSON, *President*.

Attest:

E. HEWIT RODGERS, *Secretary*.

Witness-:

R. J. FURSH.

S. McDANIEL.

"EXHIBIT B."

Amended Location Notice of the Hortense Placer Mining Claim.

Know all men by these presents, That, whereas, Edward 26 Rodgers, Eb Rogers, A. F. Rodgers, E. C. Leman, H. G. Ross, James H. White and W. F. Robinson, did on the 31st day of March, A. D. 1902, locate the Hortense Placer Mining Claim in the Brickland Mining District in the County of Dona Ana, Terri-

tory of New Mexico, having theretofore discovered valuable placer mining deposits within the confines of such Mining Claim, and did on the 30th day of April, A. D. 1902, post a notice of such location in a conspicuous place upon said claim and did thereafter and at 9 o'clock A. M. of the 30th day of April, A. D. 1902, cause a copy of such location notice to be recorded in the office of the Recorder of the said County of Dona Ana, at page 25 of Book 8, of Mining Location Notices, and did and performed all other acts necessary to constitute a valid location of a placer mining claim under the laws of the United States and the Territory of New Mexico, and

Whereas, the undersigned, The El Paso Brick Company, a corporation organized under the laws of and a citizen of the State of Texas and authorized to do business in the Territory of New Mexico, is now the owner by mesne conveyances of said Mining Claim and all of the rights, title and interest of the original locators therein and in the ground covered thereby and the minerals therein contained.

Now, then, the undersigned, said The El Paso Brick Company, for the purpose of making the surface boundaries of said mining claim to conform to the lines of the subsequent public land surveys of the United States, and to more fully comply with the statutes in such cases made and provided, and especially reserving all and waiving none of the rights acquired under and by virtue of such original location and the mesne conveyances to the undersigned, and claiming any and all the rights which the undersigned may or can acquire under and by virtue of this Amendatory Location, does hereby make this Amendatory Location of the said Hortense Placer Mining Claim, and to that end makes the following statement:

Said Mining Claim is located in Brickland Mining District in Dona Ana County, Territory of New Mexico, and more particularly described as follows:

The N. half of S. W. quarter the N. half of the S. W. quarter of S. W. quarter and the N. half of the S. E. quarter S. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ Section 9, Township 29 Range 4 East, New Mexico Principal Meridian, and the E. half of the S. E. quarter of the S. E. quarter of Section 8, said Township and Range, all aggregating 150 acres. From the S. E. corner of the S. E. quarter of the S. W. quarter of said Section 9, the center of International Boundary Monument No. 2 bears South 3201.66, and East 888.42 feet. Containing 150 acres, more or less, all of which contain valuable deposits of mineral.

This claim shall be known as the Hortense Mining Claim.

Signed, dated and posted on the ground, this 12th day of September, A. D. 1908.

THE EL PASO BRICK COMPANY,

By W. F. ROBINSON, *President*.

Attest:

E. HEWIT RODGERS, *Secretary*.

Witness:

LOUIS M. CARL.

CLINTON R. FORK.

Amended Location Notice of the Aluminum Placer Mining Claim.

Know all men by these presents, That, Whereas, E. Hewit Rodgers, Edward Rodgers, Eb. Rodgers, W. F. Robinson, B. Leibman, H. G. Ross, W. J. Harris and James H. White, did on the 5th day of November, A. D. 1900, locate the Aluminum Placer Mining Claim in the County of Dona Ana, Territory of New Mexico, having theretofore discovered valuable placer mineral deposits within the confines of such mining claim, and did on the 5th day of November, A. D. 1900, post a notice of such location in a conspicuous place upon said claim, and did thereafter and at 8:40 o'clock A. M., of the 10th day of January, A. D. 1901, cause a copy of such location notice to be recorded in the office of the Recorder of said County of Dona Ana, at page 396, of Book 7, of Mining Location Notices, and did and performed all other acts necessary to constitute a valid location of a placer mining claim under the laws of the United States and the Territory of New Mexico, and,

Whereas, the undersigned, The El Paso Brick Company, a corporation organized under the laws of and a citizen of the State of Texas and authorized to do business in the Territory of New Mexico, is now owner by mesne conveyances of said Mining Claim and all of the rights, title and interest of the original locators therein and in the ground covered thereby and the minerals therein contained.

Now, then, the undersigned, said The El Paso Brick Company for the purpose of making the surface boundaries of said mining claim conform to the lines of the subsequent public land surveys of the United States, and to more fully comply with the Statutes in such cases made and provided, and especially reserving all and waiving none of the rights acquired under and by virtue of such original location and the mesne conveyances to the undersigned, and claiming any and all the rights which the undersigned may or can acquire under and by virtue of his Amended Location, does hereby make this Amended Location of the said Aluminum Placer Mining Claim, and to that end makes the following statement:

Said Mining Claim is located in Brickland Mining District in Dona Ana County, Territory of New Mexico, and is more particularly described as follows:

The N. half of the N. W. quarter of the N. E. quarter of Section 16, Township 29, Range 4 East, New Mexico Principal Meridian, and also lots 3 and 4 Section No. 9, of said Township and Range, said lots containing respectively in the order named, 33.04 acres and 58.60 acres, all of said lots and fractional part of said Section containing in the Aggregate 111.64 acres from S. W. corner of Lot No. 4 of said Section 9, the center of International Boundary Monument No. 2 bears South 3201.66 feet and East 888.42 feet,

containing 111.64 acres, more or less, all of which contain valuable deposits of mineral.

This Claim shall be known as the Aluminum Mining Claim.

Signed, dated and posted on the ground, this 12th day of September, A. D. 1908, at 11:30 o'clock.

THE EL PASO BRICK COMPANY,
By W. F. ROBINSON, *President*.

30 Attest:

E. HEWIT RODGERS, *Secretary*.

Witness:

LOUIS M. CARL.
CLINTON R. FORK.

Which said answer is endorsed upon the back in words and figures following to-wit:

No. 2849. In the District Court of the Third Judicial District of the Territory of New Mexico for Dona Ana County. John H. McKnight vs. El Paso Brick Company. Answer. Hawkins & Franklin, Attys. for defendant. P. O. Address, El Paso, Texas. Third Judicial District Court, County of Dona Ana. Filed in my office this 30 day of Jan., 1909. Wm. E. Martin, Clerk. By John Lemon, Deputy.

And afterwards, to-wit: on the 8th day of February, A. D. 1909, there was filed by the Clerk Plaintiff's Reply to the Defendants' Answer, which said Reply is in words and figures following to-wit:

31 In the District Court of the Third Judicial District of the Territory of New Mexico for Dona Ana County.

No. 2849.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendant.

Reply.

The plaintiff above named for reply to the answer of the complaint filed in the above entitled cause says:

That this plaintiff admits that on the 12th day of September, A. D. 1908, and for one or more years prior thereto, the land contained in said Aluminum group of Placer Mining Claims and each of them was embraced within one or other of the locations, copies of which are attached to the defendant's answer, but denies that the said locations were valid or duly and lawfully made; and denies that the said defendant was at the time aforesaid or at any other time or is now the owner thereof as against all persons other than the United States, and admits that the defendant now claims and

holds all of said Aluminum group of said Placer Mining Claims and of each constituting the same under and by virtue of its said location notices and by virtue of a pretended doing and performance by the defendant and its grantors of the matters and things required by law in order to hold and own the same; but denies that the defendant, by reason of the premises, owns or has ever owned, as against this plaintiff, so much of the land embraced in
 32 said group of Placer Mining Claims as is described and claimed by the plaintiff in his said complaint.

EDWARD C. WADE,

Attorney for Plaintiff, Las Cruces, New Mexico.

STATE OF CALIFORNIA,

County of Los Angeles, ss:

John H. McKnight, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled cause; that he has read the foregoing reply and understands the same and that the same is true of his own knowledge save as to the matters and things therein stated on information and belief and as to those matters and things he believes them to be true.

JOHN H. MCKNIGHT,

*Sometimes known as J. H. McKnight.

Subscribed and sworn to before me this 5th day of February, A. D. 1909.

[SEAL.]

J. M. WIEOE,

Notary Public, Los Angeles County, California.

Which said reply is endorsed upon the back in words and figures following to-wit:

No. 2849, Civil. Third Judicial District Court Dona Ana County, New Mexico. John H. McKnight, Plaintiff, vs. El Paso Brick Company, Defendant. Reply. Third Judicial District Court,
 33 County of Dona Ana. Filed in my office this 8 day of Feb. 1909. Wm. E. Martin, Clerk. By John Lemon, Deputy.

34 "In the Third Judicial District Court of the Territory of New Mexico, Sitting within and for the County of Dona Ana.

No. 2849. Civil.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, a Corporation, Defendant.

Stipulation.

Supplementing the stipulation hereinbefore entered of record, it is stipulated and agreed that on the — day of August, 1905, the

defendant company made application for patent for certain mining claims described as the Aluminum group, and consisting of the "International" placer claim and of the "Hortense" and "Aluminum" placer claims, which application was based upon and confirmed in shape so far as the Hortense and Aluminum claims are concerned to the original location notices made a part of defendant's answer herein, and accompanied the same with various proofs necessary to be considered by the Land Office with reference to such application and including the affidavit of posting of the application, plat and field notes upon the land, a copy of which affidavit is hereto attached as "Exhibit A;" that after the issuance of receiver's receipt hereinafter referred to and while such application for patent was being considered by the Honorable Commissioner of the General Land Office, the defendant caused to be made a supplemental affidavit with reference to such posting on such

35 claim, a copy of which supplemental affidavit is hereto attached as "Exhibit B." Subsequent to the application for patent being submitted to the Land Office at Las Cruces, publication of notice thereof was made, and subsequent thereto, upon submission of proofs of such application of notice, payment was made by the defendant to the proper official of such Land Office of the amount required by the United States in purchase of placer mining claims in accordance with the acreage involved in the claims embraced in such application. The receiver of such Land Office on the 23rd day of October, 1905, issued to the defendant a final receipt for the amount of such payment due for such claims and so paid a copy of which receipt is hereto attached as "Exhibit C." Subsequent to the issuance of such receipt the entry covered thereby was upon due notice to the applicant considered by the Commissioner of the General Land Office upon his own initiative and upon various protests presented against the allowance of the same, and said Commissioner, on the — day of — 190— upon full hearing, rendered his decision cancelling such entry, a copy of such decision is hereto attached as "Exhibit D;" that thereupon an appeal by the applicant from the decision of the Commissioner was taken to the Honorable Secretary of the Interior, who, after considering such appeal on the — day of —, 1908, rendered his decision cancelling such entry; and thereafter, on the — day of — 1908, defendant waived before the Honorable Secretary its right to make a motion for a review of such decision, and thereupon said decision and the cancellation of said entry became final and said entry was cancelled on the records of the Land Office, a copy of which decision of the Secretary of the Interior is hereto attached as "Exhibit E."

36 And it is further stipulated and agreed that the copies hereto attached as exhibits are part of this stipulation and shall be given the same force and effect as the originals thereof duly proven and placed in evidence.

EDWARD C. WADE,

Attorney for Plaintiff, Las Cruces, New Mexico.

HAWKINS & FRANKLIN,

Attorneys for Defendants.

Endorsed: No. 2849. In the District Court of New Mexico for the County of Dona Ana. John H. McKnight, Plaintiff, — El Paso Brick Company, a Corporation, Defendant.

EXHIBIT "C" TO STIPULATION.

Ex. No. 2.

(4-145)

Receiver's Receipt.

(Duplicate to be Given the Purchaser.)

Mineral Entry No. 719.

Lot No. 1162.

UNITED STATES LAND OFFICE

AT LAS CRUCES, N. MEXICO.

October 23, 1905.

Received from The El Paso Brick Company, El Paso, Texas, the sum of Ten hundred and twenty-seven and 50-100 dollars, the same being payment in full for the area embraced in that Mining Claim known as the "Aluminum Placer Group" Unsurveyed, in Township No. 29 South of Range No. 4 East, N. M. Principal Meridian, designated as lot No. 1162, said Lot No. 1162 — feet in — length along said — vein or lode, expressly excepting and excluding from this sale and Entry all that portion of the ground embraced in mining claim — or Survey — designated as Lot No. — No. Conflict — and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said Placer claim as entered embracing 410.90 acres in the Brickland Mining District, in the County of Dona Ana and Territory of New Mexico, as shown by the survey thereof. \$1027.50.

HENRY D. BOWMAN, *Receiver.*

Endorsed: Receiver's Receipt in Mineral entry No. 719 in case of the Mining Claim known as the "Aluminum Placer Group" Brickland Mining District Dona Ana County, New Mexico.

Lot No. 1162.

EXHIBIT "D" TO STIPULATION.

Copy.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE.

WASHINGTON, D. C., April 10, 1906.

Register and Receiver, Las Cruces, New Mexico.

SIRS: October 23, 1905, the El Paso Brick Company made mineral entry No. 719, for the Aluminum, Hortense and International Placer claims, to which the following objections are found:

(1) No sworn statement by claimant company as to charges and fees paid has been furnished, as required by paragraph 52 of the mining regulations.

(2) No evidence has been furnished that the claim does not contain a lode or vein as required by paragraph 26 of the mining regulations.

(3) Affidavits as to posting and continuous posting are made before a notary public in and for the county of El Paso, Texas, and not before an officer authorized to administer oaths within the land district, as required by Sec. 2335, United States Revised Statutes.

(4) The Hortense Placer, embracing 156.83 acres, was located by seven persons and is therefore invalid as to the area in excess of one hundred and forty acres Paragraph 28, mining regulations.

(5) Full title to the Aluminum Placer is not shown to be in the claimant company. Edward Rogers, Eb. Rogers and B. Liebman, three of the locators, do not appear to have conveyed or lost their interests. Paragraph 74-77, mining regulations.

(6) Improvements on the Aluminum Placer, consisting of a number of shallow shafts and open cuts are valued at \$225. Certain improvements on another claim are sought to be credited to this claim.

In this connection the deputy surveyor reports:

Improvements to the value of \$275, were done on the International Placer claim of this survey in shaft No. — and open cuts Nos. 5 and 6 for the benefit of this claim. Said improvements were done by sinking through the strata and by proving the commercial value of the material, the strata of clay being the same in all three claims.

Notwithstanding this report it does not appear that these improvements should be credited: The benefit alleged relates not to development but to discovery which should be demonstrated by work done within the boundaries of the claim. The statutory requirement as to labor and improvements does not appear to have been complied with.

(7) The mineral character of the land does not satisfactorily appear. In its application for patent the claimant company alleges that the claims abound in alumina, kaolin, fire clay, manganese, lime, decomposed limestone, shale, and brick clay, and is chiefly valuable for shale, fire and brick clay.

The deputy surveyor reports to each location that: The soil embraced in this claim consists of decomposed lime and shale; the substrata of clay-shale and well adapted to the manufacture of bricks, tiles, pipes, etc. There is a suggestion especially in the deputy surveyor's report that the land is only valuable for ordinary brick clay which would not warrant the classification of the land as mineral (6 L. D., 761). A further showing as to the mineral character of the land is required. It is shown that bricks are being extensively manufactured on the claim. Showing as to the character of the product would be valuable evidence in this connection.

(8) The Aluminum and Hortense placers are irregular in shape

and do not conform to the system of United States surveys. In this connection the deputy surveyor makes the following supplemental report accompanied by a diagram which represents the contention of the claimant company:

The International placer claim, and line- 1-5 and 5-4 of the Aluminum placer claim and the north line of the Hortense placer claims from corner 6 to corner 11 thereof follow the west bank of the Rio Grande or the west and south line or boundary of the Southern Pacific Right of way. All the lands between these three claims and the Rio Grande or the Texas boundary line is all occupied by the Southern Pacific right of way or Mr. Kiser's ranch.

Survey No. 1162 Aluminum placer claim is joined on the east and north by the Rio Grande and the Southern Pacific Railway on the west by unknown claims, on the south by the Republic of Mexico, the El Paso and Southwestern Railway and very high rough mountains. The mountains West of the International placer claim, and south of the Aluminum and Hortense placer claims are extremely rough and practically inaccessible.

It would be difficult to make the claims more compact on account of the bends in the Rio Grande lands occupied by the Southern Pacific Railway and Mr. Kiser's ranch and the rough country south of the Aluminum and Hortense claims.

These mountains are useless for the purposes of mining.

The claims cannot be made in a compact form without impairing their value on account of their natural boundaries.

The only claim which touches the Rio Grande is the International placer to which no objection is made as to shape. The eastern, northern and part of the western boundaries of the Hortense and Aluminum placers follow the line of the "old track" of the Southern Pacific Railway describing approximately a semi-circle. The southern boundary is a range of mountains "practically inaccessible." No boundaries by other mining locations are definitely represented. Between the "old track" of the railroad and the Rio Grande is a long narrow strip of land represented as "Kiser's ranch." All of the lands mentioned are unsurveyed and the nature of the claim to the Kiser ranch to be an obstacle which would require location and survey to be made in the manner represented. The claimant company's contention, therefore, that the Hortense and Aluminum placers conform as nearly as practicable to the system of United States surveys does not appear to be well founded, and objection is found accordingly. See Miller placer (30 L. D., 229), Hogan and Idaho placer (34 L. D., 42) and Rialto No. 2 placer (34 L. D., 44).

You will allow the claimant company sixty days from notice to show cause why the entry should not be cancelled, in default of which and of appeal the same will be cancelled without further notice.

Very respectfully,

W. A. RICHARDS,
Commissioner.

42

EXHIBIT "E" TO STIPULATION.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, Sept. 9, 1908.36-218.
D-320.

No. 719. "N."

Ex parte El Paso Brick Co.

Appeal, Las Cruces, N. M.

The Commissioner of the General Land Office.

SIR: The El Paso Brick Company, a corporation, has appealed from your office decision of September 4, 1906, which held for cancellation of the company's entry, No. 719, made October 23, 1905, for the International, Aluminum and Hortense placer mining claims, constituting the Aluminum placer group, survey No. 1162, Las Cruces, New Mexico, land district, for the reason that the affidavit of posting of the plat and notice on the land was subscribed and sworn to before a notary public in and for the county of El Paso, State of Texas, and not before an officer authorized to administer oaths within the land district where the claims are situated, as required by section 2335 of the Revised Statutes.

August 2, 1905, the company filed, with other documents its application for patent, duly verified on the preceding day before the register of the local office by its authorized attorney in fact, wherein among other things, he avers:

43 That he posted in a conspicuous place on said lands his notice of intention to apply for patent, together with a copy of aforesaid plat on the 10th day of June, 1904, which said notice and plat is now so posted on said lands and that a copy of said notice, together with the proof of posting same attached thereto, is filed herewith.

The proof of posting referred to consists of the affidavit of two persons, as having been present on June 10, 1904, when the plat and notice were posted upon the claims in a conspicuous place which is described with definiteness and particularity, but such affidavit was executed before a notary public in the State of Texas, as above stated.

The plat and notice remained posted until October 20, 1905. Publication began August 11, 1905, and was continued for the full period of sixty days, concurrently with posting upon the land and in the local land office.

By decision of April 10, 1906, your office found the entry to be defective in the following particulars, namely, that no sworn statement as to fees and charges had been filed; that no evidence as to whether the claims contained known veins or lodes was furnished; that the affidavits as to posting and continuous posting were not executed within the land district; that the Hortense claim appeared to contain an excess area; that full title to the Aluminum claim was not shown to be in the company; that the requisite improvements

were not shown; that the mineral character of the land did not satisfactorily appear; and that the Aluminum and Hortense claims were irregular in shape and no sufficient reason was shown for the failure to conform them as near as practicable with the United States system of public-land surveys. The company was granted sixty days

44 in which to show cause why the entry should not be cancelled. In response to numerous affidavits and exhibits, designed to overcome the above objections; were filed on behalf of the company, and among them, certain affidavits executed before a notary public within the land district showing the fact of the seasonable posting on the land.

September 4, 1906, your office considered the showing submitted, and stated that it appeared to be necessary to discuss but one feature of the case in order to show that the entry was fatally defective, namely, the original affidavit as to posting. Finding that that affidavit was not executed as required by the statute, and citing as authorities the cases of *Mattes v. Treasury, etc., Co.* (34 L. D., 314) and *Frazier Borates Mining Co. v. Calm* (departmental decision of March 17, 1905, unreported), your office concluded that the entry must be held for cancellation. The pending appeal followed.

The appellant company has assigned a number of specifications of error. Additional affidavits and exhibits have been filed by the company for the purpose of sustaining the entry, and exhaustive printed briefs and arguments have been submitted by counsel.

Certain persons asserting claims to portions of the land have filed protest against the entry, and on their behalf there have been presented extensive arguments and counter-affidavits designed to support the decisions of your office. Up to the present time, however, the case has been an *ex parte* proceeding.

It is not necessary, and would serve no useful purpose at this time to enter into details as to the discussion presented by the respective counsel, which covers a wide range. Suffice it to state that the ap-

pellant company earnestly contends, in effect, that the defect
45 as to the affidavit of posting upon the claims is not fatal to the entry under the circumstances of this case and does not go to the jurisdiction of the land department to entertain the present patent proceedings. In other words, it is argued that the provision of the statute, as to the filing of the affidavit of two witnesses showing posting upon the land, is not mandatory but directory; that the jurisdiction of the local officers attaches by virtue of the fact of posting, which is not questioned here, and not by reason of the filing of the proof of such fact in the precise form directed by the statute, provided the fact of posting clearly appears otherwise as it is claimed that it did in this case by the allegations contained in the patent application.

The following provisions of the Revised Statutes are pertinent to this case:

SEC. 2325. * * * Any person, association, or corporation * * * who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common * * * and shall post a copy of such

plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made for the period of sixty days, in a
46 newspaper to be made by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period.

SEC. 2335. All Affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office.

With the contention of the company the Department is unable to agree. The allegations of the application are verified by but one person, while the statute requires "an affidavit of at least two persons." Sec. 2325, *supra*. And the department has heretofore held that these particular provisions of the statute are mandatory. In the case of Mojave Mining & Milling Co. v. Karma Mining Co. (34 L. D., 563-6), in which the affidavit of posting contained no statement that the plat of the claim was posted, or in any manner mentioned or referred to it, the following language was used:

The statutory requirement that the fact of posting shall be shown by an affidavit of at least two persons is mandatory, and one against which the land department is without authority to grant relief. Until such affidavit is filed the register is without authority to proceed upon the application, and should not attempt to do so in any case. As the required affidavit was not filed in this case the proceedings upon the application for patent were without authority of law. In this particular the terms of the statute were not complied with and there is therefore no assumption that the applicant
company is entitled to a patent and that no adverse claim
47 exists. Such being the state of the record, the patent proceedings must fall, and it is not material to inquire whether the plat and notice were in fact posted as required or not. The entry will be cancelled, but without prejudice to the renewal of patent proceedings should the applicant company so desire.

In the case of the Frazier Borate Mining Co. v. Calm (unreported departmental decision of June 15, 1905, on review), where the question involved was the verification of an application for patent and an affidavit of posting, in each case outside of the land district, the Department held as follows, the quotation also appearing in the case of Milford Metal Mines Investment Co. (35 L. D., 174-5):

Neither section 2335 of the Revised Statutes, nor any other pro-

vision of the mining laws, authorized the verification of applications for patent or affidavits such as here involved otherwise than before an officer authorized to administer oaths within the land district where the claim is situated. The attempted verification of the application and affidavit in question before an officer acting without authority of the law, was of no more legal effect than if no attempt at verification had been made; and the notice published by the register based upon such application, and affidavit, being without legal foundation, was fatally defective. The case was therefore not one of mere irregularity, or one which presented defects that might be cured by supplemental proceedings. The notice being invalid, the entry cannot stand. (Southern Cross Gold Mining Company v. Sexton et al., 31 L. D., 415.)

Having under consideration the verification of an adverse claim, the Department, in the case of *Mattes v. Treasury, etc., C.*,
48 on review (34 L. D., 314), held as follows (syllabus):

All affidavits under the mining laws are required to be verified in accordance with the provisions of section 2335 of the Revised Statutes, except where authority for their execution is otherwise specifically given by statute.

The foregoing views of the Department are in harmony with, and are re-enforced by, other cases in which a similar principle has been invoked. In the case of *Rico Lode* (8 L. D., 223) the entry was held to be invalid because the application, as well as all other papers except the proof of continuous posting, was verified by the attorney in fact, while the applicants themselves were residents of, and were within, the land district at the time the application was made. In the case of *Crosby and Other Lode Claims* (35 L. D. 434) the application for patent was held to be a nullity because verified by an agent, the applicants being residents of the land district and not being shown that at the time the application was made they were in fact not within the same; and a request that the case be submitted for equitable consideration and action under sections 2450 and 2457, inclusive, of Revised Statutes, was denied. The application for patent in the case of the *North Clyde Mining Claim and Millsite* (35 L. D., 455) was held to be bad because verified outside of the land district. In each of these cases the proceedings were held to be invalid and the entry ordered cancelled.

In view of the foregoing it must be held that the affidavit of posting here in question is fatally defective. The defect is not a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are
49 mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having theretofore — filed, the register was without authority to direct the publication of the notice or otherwise proceed; and the notice, although in fact published and posted (copy deficient) had not the necessary legal basis, was a nullity and ineffectual for any

purpose. The patent proceedings therefore fall and the entry will be cancelled.

The appellant company puts forward a further and alternative contention to the effect that, even though the entry should be considered defective, yet it should be submitted for equitable consideration under said sections 2450 to 2457 of the Revised Statutes. This disposition cannot be made of the case for the reason that the record shows that there are alleged adverse claims and for the further reason that, as was held in the case of Crosby and other Lode claims, *supra*, there has been no substantial compliance with the law, the entry and the proceedings upon which it is based being wholly invalid.

Inasmuch as the conclusion reached above effectually disposes of the present entry, it is unnecessary to discuss the other questions raised by counsel in the argument.

It should be pointed out, however, that from the record before the Department it appears that three homestead entries (Nos. 4723, 4724 and 2931, Las Cruces series) were inadvertently allowed of record in the year following the making of the mineral entry, each one in part in conflict therewith. One of these entries (No. 4724) was a second homestead filing and was allowed by the local officers in the absence of the authorization of your office and of the necessary showing required in cases of second entries. Also against 50 this entry two corroborated protests have been filed, charging the mineral character of portions of the land covered thereby.

In this connection attention is directed to the allegations of the numerous affidavits, filed on behalf of the company, tending to establish the mineral character of the land embraced within its three placer mining claims. These matters should receive due consideration, and your office will take such action and give such instructions to the local officers as the premises may warrant.

Very respectfully,

(Signed)

FRANK PIERCE,
First Assistant Secretary.

The decision appealed from is accordingly affirmed.
(Exhibit "C.")

EXHIBIT "S."

Serial No. 03081.

Receipt No. 98509.

Adverse Claim and Protest.

In the United States Land Office at Las Cruces, New Mexico, in the matter of the Application of the El Paso Brick Company, a Corporation, for U. S. Mineral Patent for the Aluminum Group of Placer Mining Claims (so called) consisting of the "Aluminum," the "International," and the "Hortense" Placer Claims, all situated in the Brick Land (so-called) Mining District, in the County of Dona Ana, New Mexico.

To the Register and Receiver of the United States Land Office at Las Cruces, New Mexico, and to the above named applicant:

Whereas the El Paso Brick Company, a corporation, hereinafter called the applicant or corporation, did on the 25th day of
51 November, 1908, in the above named land office, file its application for United States Mineral Patent for the Aluminum Group of Mining Claims embracing the "International," the "Aluminum," and the "Hortense" Mining Claims, such "Aluminum" Mining Claim consisting of the North-Half of the North-West quarter of the North-East quarter of Section 16 and lots 3 and 4 of Section 9 in Township 29 South of Range 4 East, N. M. P. M., in area 111.64 acres, and such "Hortense" claim consisting of the North-Half of the South-West quarter and the North-Half of the South-West quarter of the South-West quarter and the North-Half of the South-East quarter of the South-West quarter and the South-East quarter of the South-East quarter of the South-West quarter of Section 9 and the East-Half of the South-East quarter of the South-East quarter of Section 8 in Township 29 South of Range 4 East, N. M. P. M., in area 150 acres; and did afterwards give notice in the "Las Cruces Citizen," a newspaper published at Las Cruces, New Mexico, that it had made application for United States Mineral Patent for said group of Placer Claims, such notice being first published in said weekly newspaper on November 28, 1908.

Now, therefore, you will take notice that the undersigned, John H. McKnight, a citizen of the United States over the age of 21 years and a resident of Los Angeles, in the State of California, hereinafter called the adverse claimant, does hereby make and enter his protest and adverse claim against the issuance of a United States Patent to said El Paso Brick Company, embracing or including so much or any of the ground and land described in said application for patent on the "Aluminum" and "Hortense" claims as is described in the "Agnes," "Lulu," "Lynch," "Tiptop," and
52 "Aurora" Placer Mining Claims, hereinafter specially mentioned and referred to, and set out and described in the several exhibits hereto attached and as is shown to be in conflict

with said "Aluminum" and "Hortense" claims by the map herewith filed and made a part hereof marked "Map No. 1," to which map and the said attached exhibits reference is hereto made for a particular showing as to the area in conflict between said "Aluminum" and "Hortense" claims, of the one part, and the said "Agnes," "Lulu," "Lynch," "Tiptop" and "Aurora," of the other part, said "Aluminum" claim being indicated on the said map in green color, said "Hortense" claim in purple color and said "Agnes," "Lulu," "Lynch," "Tiptop," and "Aurora" claims in red color.

And this adverse claimant makes the following statement of the nature, boundaries and extent of his adverse claim and shows:

(1) That at the time of locating (as hereinafter stated) of said "Agnes," and "Lulu" Placer Mining Claims, to-wit, April 7, 1905, the ground and premises included therein, all of which lies in Section 9 Township 29 South of Range 4 East, N. M. P. M., and in the County of Dona Ana, New Mexico, were of the vacant, unappropriated, unsurveyed public domain of the United States of America and subject, notwithstanding certain pretended locations thereof by the application corporation or its grantors, to exploration, discovery and location; that this adverse claimant on the day and year last aforesaid for the purpose of exploring the said ground and premises for mineral made peaceable and unopposed entry thereon, discovered valuable mineral deposits of fire-clay therein and within each of the said claims, took possession of the same and located the same under the names of the "Agnes," and "Lulu"

Placer Mining Claims and consummated such location and possession by then and there distinctly marking on the ground each claim and location so that the boundaries thereof could be readily traced and by then and there posting in a conspicuous place on the "Lulu" claim a like notice of the location thereof, and by causing copies of the said location notices to be recorded within the time prescribed by law in the proper mining records of the said county of Dona Ana and by otherwise fully complying with all of the laws of the United States of America and of the Territory of New Mexico and with the local rules and customs. Copies of which location notices are hereto attached and marked respectively "Exhibit 1", and "Exhibit 2" and are made a part hereof. That at the time of the locating of the said "Lynch," "Tiptop", and "Aurora" Placer claims, to-wit, on the 5th day of May, 1906, the ground and premises embraced therein, respectively, all of which lie in Section 9 Township 29 South of Range 4 East, in the said county of Dona Ana, were of the vacant, unappropriated, surveyed, public domain of the United States of America and subject, notwithstanding certain pretended locations thereof by the applicant corporation or its grantors, to exploration, discovery, and location under the laws of the United States of America and of the Territory of New Mexico and the local rules and customs; that on the day and year last aforesaid this adverse claimant for the purpose of exploring the said ground and premises entered peace-

ably and unopposed thereon and discovered therein and in each of the said claims valuable mineral deposits of fire-clay and then and there took possession of and located the same under the names of th "Lynch", "Tiptop," and "Aurora" Placer Claims and

54 consummated such locations by then and there distinctly marking on the ground each claim and location so that the boundaries thereof could be readily traced and by then and there posting in a conspicuous place on each of said claims a notice of the location of same and by causing copies of the said several notices so posted to be recorded in the proper mining records of the said county of Dona Ana and by otherwise complying with the laws of the United States of America and of the Territory of New Mexico and with the local rules and customs applicable to the location and possession of placer mining claims: copies of which notices so posted and recorded are hereto attached marked "Exhibit 3" and "Exhibit 4" and "Exhibit 5" respectively and are made a part hereof. That afterwards, to-wit, on the day and year last aforesaid and whilst the premises were still of the vacant and unappropriated public lands of the United States subject to exploration and location, (save as previously located by this adverse claimant this adverse claimant for the purpose of conforming the surface boundaries of said "Agnes" and "Lulu" placer claims to the lines of the public survey as near as practicable, such surveys having been extended over the said last mentioned claims subsequent to the previous location thereof, and especially reserving all and waiving none of the rights acquired under and by virtue of said original locations and the several mesne conveyances thereof, made an amendatory location of said "Agnes" claim and a like amendatory location of said "Lulu" claim and consummated such amendatory locations by then and there distinctly marking on the ground each claim and location (as so amended) so that the boundaries thereof could be readily traced and by then and there posting in a conspicuous place on each of said amendatory locations, a notice thereof, and

55 by causing, within the time prescribed by law, copies of the notices of such amendatory locations so posted to be recorded in the mining records of the said county of Dona Ana and by otherwise fully complying with all the requirements of the laws of the United States of America and of the Territory of New Mexico and of the local rules and customs: copies of which notices and amendatory locations are hereto attached and marked "Exhibit 6" and "Exhibit 7" respectively and are made a part hereof. And this adverse claimant hereto attaches and makes a part hereof a Plat marked "Plat No. 2" correctly showing within the red lines the boundaries and relative position of the said "Agnes" and "Lulu" claims as originally located and within the black lines the boundaries and relative position of the said "Agnes" and "Lulu" claims as established in the amendatory locations of the said claims. That the adverse claimant and his grantors for and during each year ever since the making of the said location and each of them and including the year 1908 caused to be done and performed for or upon each of the said claims the full annual labor required by

law. And that he is advised and believes and so charges the fact to be that each of the said claims is a valid and subsisting claim under the laws of the United States of America and of the Territory of New Mexico and under the local rules and customs.

(2) That of the ground and premises described in said application for mineral patent and as being a part of the said Aluminum claims, lots number 3 and 4 of Section 9 Township 29 South of Range 4 East conflict with said "Agnes," "Lulu," "Lynch," "Tiptop," and "Aurora," claims and that of the ground and premises described in said application as being a part of the said "Hortense"

claim, the North Half of the South-West quarter of Section 56 9 Township 29 South of Range 4 East, conflict with the said "Lulu" claim and the ground and premises so in conflict are not the property of said applicant but are the property of this adverse claimant (subject to the paramount rights of the United States) and are adversely claimed and owned by this adverse claimant's grantors as will appear by the abstract of title hereto attached and made a part hereof marked "Exhibit S". That this adverse claimant and his grantors have held, occupied and possessed all the ground and premises so in conflict as aforesaid and within the exterior limits of said "Agnes," "Lulu," "Lynch," "Tiptop," and "Aurora" claims for a period beginning long prior to any discovery of any mineral deposit by the applicant or his grantors within the limits of the said "Aluminum" and "Hortense" claims or either of them, such occupation and possession by this adverse claimant and his grantors having been under and by virtue of a full compliance with the laws of the United States of America and of the Territory of New Mexico and the local rules and customs.

(3) That this adverse claimant is the original discoverer and locator and is now the owner as purchaser for a valuable consideration from this adverse claimant's original grantee (as shown in said abstract) of the valuable mineral deposits, and the ground containing the same, embraced in said "Agnes", "Lulu", "Lynch", "Tiptop" and "Aurora" claims.

(4) That a valid discovery, location and record of said "Agnes", "Lulu", "Lynch", "Tiptop", and "Aurora" claims were made by this adverse claimant in strict compliance with the laws of the United States of America and the Territory of New Mexico and the local rules and customs and while the ground embraced therein was vacant and unappropriated mineral land of the United

57 States long prior to any discovery of mineral within the said "Aluminum" and "Hortense" claims or either of them, and the said "Agnes", "Lulu", "Lynch", "Tiptop", and "Aurora" claims have been held, occupied, and possessed by this adverse claimant and his grantors ever since the discovery of said mineral deposits therein by this adverse claimant and the location thereof by him, as aforesaid.

(5) That this adverse claimant is informed and believes and so charges the fact to be that the said pretended locations of said "Aluminum" and "Hortense" claims were not made in good faith but in fraud and evasion of the provisions of the laws of the

United States of America and of the Territory of New Mexico applicable to the appropriation of public mineral lands, in this, that the applicant corporation, at the time of the making of said pretended locations was engaged (or about to be engaged) in business of the manufacture of common brick on a portion of said premises and for the purpose of procuring a monopoly of the material necessary for the manufacture of such brick and of preventing the establishment of competitive plants in its neighborhood and for the further purpose of evading the requirements of law touching the performance of annual labor of the value of \$100.00 upon or for each claim of 20 acres, caused the said three claims (having an area of 400.86 acres in the aggregate) to be located in the name of the stockholders and the employees of the applicant corporation and of persons closely associated with the officers and agents thereof with the understanding and agreement that the said locators should, (which they afterwards did) convey the said claims and locations to the applicant corporation, without any valuable consideration whatever, and did procure the said pretended

58 "Hortense" claim of 150 acres to be located in the names of seven persons (rather than in the names of eight persons) as appears by the record notice of said "Hortense" claim and the record certificate of the amendatory location thereof.

(6) That neither the applicant corporation nor any of its grantors ever made any discovery of valuable mineral deposits in either the said "Aluminum" or "Hortense" claims prior to the discoveries made as aforesaid by this adverse claimant or prior to the location by him as aforesaid of said "Agnes," "Lulu," "Lynch," "Tiptop," and "Aurora" claims.

(7) That this adverse claimant is informed and believes and so charges the fact to be, that if said "Aluminum" and "Hortense" claims were ever legal and valid locations and claims, the applicant corporation and its grantors forfeited and abandoned its and their rights therein and in each thereof by neglecting and failing in the year 1904 and 1905 and for a long time prior thereto to do and perform the annual labor required to be done and performed for or upon each of said mining claims for and during said years, by reason whereof all of said premises became and were vacant mineral lands of the United States and open to exploration and discovery and location by this adverse claimant at the time of the making by him of the location of the said "Agnes," "Lulu," "Lynch," "Tiptop," and "Aurora" claims.

That said "Aluminum" and "Hortense" Placer Claims as originally located by the grantors of the applicant corporation did not conform as near as practicable with the United States system of public land surveys and the rectangular subdivision of such surveys in this, that the eastern northern and part of the western boundaries

59 of said "Aluminum" and "Hortense" Placer Mining Claims as thus originally located conform to the line of the old tract of the Southern Pacific Railway Company, describing approximately a semi-circle and in this, that each of said Placer claims is otherwise irregular in shape; by reason whereof this adverse claim-

ant is advised and believes and so charges the fact to be that the original locations and each of them were void and of no effect.

This adverse claimant and protestant therefore respectfully asks that further proceedings in the matter of said application of said El Paso Brick Company for Mineral Patent upon the said group of mining claims be stayed until a final settlement and adjudication of the rights of this adverse claimant in the premises may be had in court of competent jurisdiction.

(Signed)

JOHN H. MCKNIGHT,
Adverse Claimant and Protestant.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

Before me, a notary public in and for said county, personally appeared the above named John H. McKnight, who being first duly sworn did say: that he is the adverse claimant and protestant named in the foregoing protest and adverse claim above described by him; that he has read the same and knows the contents thereof; that the same is true in substance and fact; and that the said adverse claim is made in good faith and to protect his better and prior title.

(Signed)

JOHN H. MCKNIGHT.

Sworn to and subscribed before me this 14th day of December, A. D. 1908.

(Signed)

[SEAL.]

P. MORENO,
*Notary Public, Dona Ana
County, New Mexico.*

60

"EXHIBIT 1."

Placer Mining Location.

"Agnes" Placer Mining Claim.

Notice is hereby given, to all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one years have located, and by these presents do locate Twenty acres of Placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in County of Dona Ana, Territory of New Mex., and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stone situated on the South line of the Southern Pacific Rail Road about two hundred feet Easterly of said Rail Road's yard limits post, running thence Easterly along the South line of said Rail Road Six hundred Sixty feet (660) to a monument of stone, thence South Easterly along South line of said Rail Road Thirteen hundred twenty feet (1,320) to a monument of stone, Thence Southwesterly parallel with westerly line Six hundred Sixty feet (660) to a monument of stone, Thence North West-

erly thirteen hundred twenty feet (1,320) to the place of beginning.
Said land and claim to be known as the Agnes Placer Mining Claim.

Date- on the ground this 7th day of April, 1905.

J. H. MCKNIGHT, *Locator*.

Witness:

T. L. MYERS.

Recorded in Mining Book No. 8, page 503.

Filed for record April 11, 1905.

61 TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

I, A. I. Kelso, as secretary of The Southwestern Abstract Company, do hereby certify that the foregoing Placer Mining Location Notice is a full and correct copy of said notice as the same appears of record in the office of the probate clerk and ex-officio recorder of the said county.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Southwestern Abstract Company, this the 17th day of December, A. D. 1908.

[SEAL.]

A. I. KELSO,
Sec'y & Treas. of the Southwestern Abstract Co.

"EXHIBIT 2."

Placer Mining Location.

"Lulu" Placer Mining Claim.

Notice is hereby given, To all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate Twenty acres of placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico: said land and claim lies and is situated in — Mining District, in County of of Dona Ana, Territory of New Mex., and is more particularly described as follows, to-wit:

Beginning at a monument of stones situated on the North line of the Southern Pacific Rail Road about one hundred feet north of said Rail Road's yard limit post running thence Easterly along north line of said Rail Road Thirteen hundred twenty (1,320) to
a monument of stone, thence Northerly Six hundred Sixty
62 feet (660) to a monument of stone thence westerly parallel
with South line Thirteen hundred twenty feet to a monument of stone, Thence Southerly six hundred sixty feet (660) to a monument of stone and place of beginning.

Said land and claim to be known as the Lulu Placer Mining Claim.

Date- on the ground this 7th day of April, 1905.

J. H. McKNIGHT, *Locator.*

Witness:

T. L. MYERS.

Recorded in Mining Book No. 8, page 502.

Filed for record April 11, 1905.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, A. I. Kelso, as secretary of The Southwestern Abstract Company, do hereby certify that the foregoing Placer Mining Location Notice is a full and correct copy of said notice as the same appears of record in the office of the probate clerk and ex-officio recorder of the said county.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Southwestern Abstract Company, this the 17th day of December, A. D. 1908.

[SEAL.]

A. I. KELSO,

Sec'y & Treas. of the Southwestern Abstract Co.

"EXHIBIT 3."

Location Notice.

"Lynch."

Notice is Hereby Given, To all whom it may concern, that — J.

63 H. McKnight, citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico, said land and claim lies and is situated in — Mining District, in County of Dona Ana, Territory of New Mex., and is more particularly bounded and described as follows, to-wit:

Beginning at quarter Section corner between Section 9 and 16. Tp. 29 S., R. 4 East, The Southwest corner of claim monument of stone. Thence north 20.00 chs. to N. W. corner identical with N. W. corner of Lot No. 4 monument of stone. Thence east on north boundary of lot No. 4, 10.00 chs. to N. E. corner monument of stone. Thence South 20.00 chs. to line bet. Section 9 and 16 the South East corner monument of stone where this notice is posted. Thence west along section line 10.00 chs. to southwest corner, the place of beginning, being that portion of lot No. 4 corresponding to the W. half of the SW. quarter of South East quarter Section 9 Tp. 29 S., R. 4 East, containing 20 acres.

Said land and claim to be known as the Lynch Placer Mining Claim.

Date- on ground this 5th day of May 1906.

J. H. McKNIGHT, *Locators*.

GEORGE LYNCH,

Witnesses.

Recorded in Mining Book No. 9, page 11.

Filed for record May 10, 1906.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, A. I. Kelso, as secretary of The Southwestern Abstract Company, do hereby certify that the foregoing Placer Mining Location Notice is a full and correct copy of said notice as the same appears of record in the office of the probate clerk and ex-officio recorder of the said county.

64 In Witness Whereof, I have hereunto set my hand and affixed the seal of the Southwestern Abstract Company, this the 17th day of December, A. D. 1908.

A. I. KELSO,

[SEAL.] *Sec'y & Treas. of the Southwestern Abstract Co.*

"EXHIBIT 4."

Location Notice.

"Tipton."

Notice is hereby given, to all whom it may concern that I, J. H. McKnight, citizen of the United States over the age of twenty-one years have located and by these presents do locate Twenty Acres of placer mining land in accordance with the mining laws of the United States and the Territory of New Mexico, said land and claim lies and is situated in the County of Dona Ana, Territory of New Mexico and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stone the S. E. corner of claim identical with the N. E. cor. of N. W. half of N. E. quarter of Section 16, Tp. 29 S., R. 4 East. Thence North 20.00 chains to the N. E. corner, a monument of stone.—identical with the N. E. Corner of that portion of lot No. 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9. Thence West 10.00 chains to the N. W. corner of claim—a monument of stone. Thence South 20.00 chs. to the S. W. corner of claim—a monument of stone, where this notice is posted. Thence East along Section lines between 9 and 16—10.00 chains to place of beginning, containing 20 acres being that portion of lot No. 4 Sec. 9 Tp. 29 S. Range 4 East corresponding to East half of S. W. quarter of Sec. 9, Tp. 29 S., Range 4 East.

65

Said land and claim to be known as Tip Top Placer mining claim.

Dated on the ground this 5th day of May, 1906.

J. H. McKNIGHT, *Locator*.

GEORGE LYNCH,

Witness.

Recorded in Mining Book No. 9, page 9.

Filed for record May 10, 1906.

TERRITORY OF NEW MEXICO.

County of Dona Ana, ss:

I, A. I. Kelso, as secretary of the Southwestern Abstract Company, do hereby certify that the foregoing Placer Mining Location Notice is a full and correct copy of said notice as the same appears of record in the office of the probate clerk and ex-officio recorder of the said county.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Southwestern Abstract Company, this the 17th day of December, A. D. 1908.

A. I. KELSO,

[SEAL.]

Sec'y & Treas. of the Southwestern Abstract Co.

"EXHIBIT 5."

Location Notice.

"Aurora."

Notice is hereby given, To all whom it may concern, That I, J. H. McKnight citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate 18 60-100 acres of placer mining land, in accordance with the mining laws

of the United States and of the Territory of New Mexico.

66 Said land and claim lies and is situated — Mining District, in County of Dona Ana, Territory of New Mex., and is more particularly bounded and described as follows, to-wit:

Beginning at the N. E. corner of the N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 South R. 4 East, being the S. W. corner of claim, monument of stone, where this notice is posted. Thence north 20.00 chs. to north boundary of lot No. 4 Sec. 9 the N. W. corner of claim monument of stone. Thence East 15.00 chs. to right bank of Rio Grande, North East corner of claim a post. Thence Southerly with meander of right bank of Rio Grande long east boundary of lot No. 4 Sec. 9 to meander corner on right bank of Rio Grande bet. Sections 9 and 16, the South East corner a Post, Thence west along Section line 11 25-100 chs., to the S. W. Corner place of beginning. Containing 18 60-100 acres, being that portion of lot No. 4 lying bet. the East boundary of that portion of lot 1

corresponding to the S. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S., R. 4 East and the Rio Grande.

Said land and claim to be known as the Aurora Placer Mining Claim.

Date- on the ground this 5th day of May, 1906.

J. H. McKNIGHT, *Locator*.

GEORGE LYNCH,

Witness.

Recorded in Mining Book No. 9, page 10.

Filed for record May 10, 1906.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, A. I. Kelso, as secretary of the Southwestern Abstract Company, do hereby certify that the foregoing Placer Mining Location Notice is a full and correct copy of said notice as the same appears of record in the office of the probate clerk and ex-officio recorder of the said county.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Southwestern Abstract Company, this the 17th day of December, A. D. 1908.

A. I. KELSO,

[SEAL.] *Sec'y & Treas. of the Southwestern Abstract Co.*

"EXHIBIT 6."

Additional and Amended Location Notice.

"Agnes."

Notice is hereby given, To whom it may concern, that I, J. H. McKnight, a citizen of the United States of America, over the age of twenty-one years, do hereby make this additional and amended notice of location upon the Agnes Placer Mining Claim, situate in the County of Dona Ana and Territory of New Mexico, claiming 18½ acres of placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico, and land and claim lies and is situate in the county of Dona Ana and Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at the S. W. corner of claim identical with the S. W. corner of lot No. 3 Section 9 Tp. 29 S. R. 4 east-A monument of stones, where notice is posted, whence the S. W. corner of the original location bears S. 6 deg. West 5.00 chains distant. Thence east on the south boundary of Sec. 9 20.00 chains to the N. E. corner of the S. W. quarter of S. E. quarter of Sec. 9 the S. E. corner of claim monument of stone. Thence north to right bank of Rio Grand a "stake." Thence with meander of Rio Grande north west-

erly to intersection with the south boundary of N. half of fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 the N. E. corner of claim post. Thence westerly along south boundary of N. half of S. E. quarter Sec. 9 17.28-100 chains to the west boundary of lot No. 3 Sec. 9 of the N. W. corner of claim, monument of stones; whence the N. W. corner of original claim bears N. 36 deg. west 8.70 chains distant. Thence south 10.00 chains to the place of beginning, containing $18\frac{1}{2}$ acres, more or less, being that part of lot No. 3 Sec. 9 corresponding to fractional S. half of the N. W. quarter of S. E. quarter of Section 9 Twp. 29 S. R. 4 east.

This additional and amended location notice is made without waiver of any previous rights but to correct any error in prior location or record to secure all bounded over-lapping claims and to secure all the benefits of Sec. 2301 Of the compiled laws of 1897 of the Territory of New Mex. The original location notice bears date April 7, 1905, and is recorded in the office of the Probate Clerk and Ex-Officio Recorder of said County of Dona Ana in Book 8 of Mining locations; page 503. This notice is posted on claim this 5th day of May, 1906.

J. H. McKNIGHT, *Locator*.

GEORGE LYNCH,

Witness.

Recorded in Mining Book No. 9, page 7.

Filed for record May 10, 1906.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, A. I. Kelso, as secretary of the Southwestern Abstract Company, do hereby certify that the foregoing Placer Mining Location Notice is a full and correct copy of said notice as the same appears of record in the office of the probate clerk and ex-officio recorder of the said county.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Southwestern Abstract Company, this the 17th day of December, A. D. 1908.

A. I. KELSO,

[SEAL.] *Sec'y & Treas. of the Southwestern Abstract Co.*

"EXHIBIT 7."

Additional and Amended Location Notice.

"Lulu."

Notice is hereby given, To whom it may concern that, I, J. H. McKnight a citizen of the United States of America, over the age of twenty-one years, do hereby make this additional and amended notice of location upon the Lulu Placer Mining Claim situate in the

County of Dona Ana and Territory of New Mexico, claiming 18 12-100 acres of placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situate in the County of Dona Ana and Territory of New Mexico, and is more particularly,

Beginning at the north west corner of the N. E. quarter of S. E. quarter of S. W. quarter of Section 9 Tp. 29 S. R. 4 east N. M. P. M. a monument of stone. Thence east 18 25.100 chains, to right bank of Rio Grande a post, the N. E. corner. Thence S. E. ly with meander of Rio Grande to North intersection of dividing line bet the E. and W. half of the N. W. quarter of the S. E. quarter of Sec. 9, a post. Thence south along said dividing line bet east and west halves of the N. W. quarter of the S. E. quarter of Sec. 9 to S. E. corner of N. W. quarter of N. W. 4 S. E. quarter of Sec. 9, the S.

E. corner of claim a monument of stones. Thence west along south boundary of N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 10.00 chs. Thence W. along S. boundary of N. E. quarter N. E. — chs. Thence W. along S. boundary of N. E. quarter N. E. quarter S. W. quarter Sec. 9 10 chs. to S. W. cor. of claim a monument of stones. Thence north along west boundary of N. E. quarter of N. E. quarter of Sec. 9 10.00 chs to place of beginning. Comprising the N. E. quarter of the S. W. quarter and that portion of lot 3 being fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east, containing 19.12.100 acres more or less. This notice is posted at N. W. corner of claim, whence the S. W. corner of the original location bears S. 40 deg. E. 60 lks. distant and N. W. cor. of original location bears N. 2 deg. west 10.20 chains distant.

bounded and described as follows, to-wit:

This additional and amended location is made without waiver of any previous rights, but to correct any error in prior location as record, to secure all bounded overlapping claims and to secure all the benefits of section 2301 of the compiled laws of 1897 of the Territory of New Mex. The original location notice bears date April 7th, 1905, and is recorded in the office of the Probate Clerk and Ex-Officio Recorder of said County of Dona Ana in Book 8 of Mining Locations, page 502. This notice is posted on claim this 5th day of May, 1906.

J. H. McKNIGHT, *Locater.*

GEORGE LYNCH,

Witness.

Recorded in Mining Book N. 9, page 8.
Filed for record May 10, 1906.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, A. I. Kelso, as secretary of The Southwestern Abstract Company, do hereby certify that the foregoing Placer Mining Location Notice is a full and correct copy of said notice as the same appears of record in the office of the probate clerk and ex-officio recorder of the said county.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Southwestern Abstract Company, this the 17th day of December, A. D. 1908.

[SEAL.]

A. I. KELSO,
Sec'y & Treas. of the Southwestern Abstract Co.

EXHIBIT "D."

Placer Mining Location.

Compared.

"Lulu" Placer Mining Claim.

Notice is hereby given to all to whom it may concern, that, I, J. H. McKnight, Citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the County of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stones situated on the North line of the Southern Pacific Railroad about one hundred feet north of said Railroad yard limit post running thence Easterly along north line of said Railroad, thirteen hundred and twenty (1320) feet to a monument of stone, thence northerly six hundred and sixty feet (660) to a monument of stone, thence westerly parallel with south line Thirteen hundred twenty feet to a monument of stone, thence Southerly six hundred sixty feet (660) to a monument of stone and place of beginning.

72 Said land and claim to be known as the Lulu Placer Mining Claim.

Date- on the ground this 7th day of April 1905.

J. H. McKNIGHT, *Locator.*

Witness:

T. L. MYERS.

Filed for record April 11th, 1905 at 9 A. M.

ISIDORO ARMJO, *Recorder.*

By J. F. O'LEARY, *Dep'y.*

EXHIBIT "E."

Placer Mining Location.

Compared.

"Agnes" Placer Mining Claim.

Notice is hereby given, To all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one

years, have located, and by these presents do locate Twenty acres of Placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the county of Dona Ana, Territory of N. M. and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stone situated on the south line of the Southern Pacific Railroad about two hundred feet easterly of said Railroad yard limits post, running thence easterly along the south line of said R. R. Six hundred and sixty feet (660) to a monument of stone, thence southeasterly along south line of said R. R. Thirteen hundred and twenty feet (1320) to a monument of stone, thence southwesterly parallel with westerly line, six hundred and sixty feet (660) to a monument of stone, thence northwesterly six hundred and sixty feet (660) to a monument of stone, Thirteen hundred and twenty feet (1320) to the place of beginning.

Said land and claim to be known as the Agnes Placer Mining Claim.

Date- on the ground the 7th day of April 1905.

J. H. McKNIGHT, *Locator*.

Witness:

T. L. MYERS.

Filed for record April 11", 1905 at 9 A. M.

ISIDORO ARMIJO, *Recorder*.

By J. F. O'LEARY, *Dep'y*.

Certificate.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, Isidoro Armijo, the undersigned, Probate Clerk and Ex-Officio Recorder in and for the County of Dona Ana, in the Territory of New Mexico, do hereby certify that the foregoing Placer Mining location, of the Lulu and Agnes, are true and correct copies of the original thereof, Recorded in Book of Mining Claims No. 8 at Page 502 and 503, records of Dona Ana County, N. M.

In Witness Whereof, I have hereunto set my hand and official seal at my office in Las Cruces, N. M. this the 8th day of November, A. D. 1909.

[SEAL.]

I. ARMIJO,
Probate Clerk and Ex-Officio Recorder,
Dona Ana Co., N. M.

EXHIBIT "F."

*Additional and Amended Location.**"Lulu."**Compared.*

74 Notice is hereby given, To whom it may concern that I, J. H. McKnight, a citizen of the United States of America, over the age of twenty-one years, do hereby make this additional and amended notice of location upon the Lulu Placer Mining Claim, situate in the County of Dona Ana and Territory of New Mexico, claiming 19 12-100 acres of placer mining land in accordance with the mining laws of the United States, and of the Territory of New Mexico. Said land and claim lies and is situate in the County of Dona Ana and Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at the north west corner of the N. E. quarter of N. E. quarter of S. W. quarter of Section 9 Tp. 29 S. R. 4 east N. M. P. M. a monument of stone. Thence east 18 25-100 chains, to right bank of Rio Grande a post, the N. E. corner. Thence S. E.-ly with meander of Rio Grande to North intersection of dividing line bet. the E. and W. half of the N. W. quarter of the S. E. quarter of Sec. 9—a post. Thence south along said dividing line bet. east and west halves of the N. W. quarter of the S. E. quarter of Sec. 9 to S. E. corner of N. W. quarter of N. W. 4 S. E. quarter of Sec. 9, the S. E. corner of claim—a monument of stones. Thence west along south boundary of N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 10.00 chs. Thence W. along S. boundary of N. E. quarter N. E. quarter S. W. quarter Sec. 9 10 chs. to S. W. cor. of claim a monument of stones. Thence north along west boundary of N. E. quarter of N. E. quarter of Sec. 9 10.00 chs. to place of beginning. Comprising the N. E. quarter of the S. W. quarter and that portion of lot 3 being fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east, containing 19 12-100 acres more or less. This notice is posted at N. W. corner of claim, whence the S. W. corner of the original location bears S. 40 deg. E. 60 lks. distant and N. W. cor. of original location bears N. 2 deg. west 10.20 chains distant.

This additional and amended location notice is made without waiver of any previous rights, but to correct any errors in prior location or record, to secure all bounded overlapping claims and to secure all the benefits of section 2301 of the compiled laws of 1907 of the Territory of New Mexico. The original location notice bears date April 7th. 1905, and is recorded in the office of the Probate Clerk and Ex-Officio Recorder of said County of Dona Ana in Book 8, of Mining Locations, page 502.

This notice if posted on claim this 5th day of May, 1906.

J. H. MCKNIGHT, *Locator.*

GEORGE LYNCH, *Witness.*

Filed for record May 10, 1906 at 4 P. M.

ISIDORO ARMIJO, *Recorder.*

EXHIBIT "G."

*Additional and Amended Location Notice.**"Agnes."*

Compared.

Notice is hereby given, To whom it may concern, that I, J. H. McKnight, a citizen of the United States of America, over the age of twenty-one years do hereby make this additional and amended notice of location upon the Agnes Placer Mining Claim, situate in the County of Dona Ana and Territory of New Mexico, claiming 18½ acres of placer mining land in accordance with the mining

laws of the United States and of the Territory of New Mexico.
76 Said land and claim lies and is situate in the County of Dona Ana and Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at the S. W. corner of claim identical with the S. W. corner of lot No. 3 Section 9 Tp. 29 S. R. 4 east—A monument of stones, where notice is posted, whence the S. W. corner of the original location bears S. 6 deg. West 5.00 chains distant. Thence East on the south boundary of Sec. 9 20.00 chains to the N. E. corner of the S. W. quarter of S. E. quarter of Sec. 9 the S. E. corner of claim monument of stone. Thence north to right bank of Rio Grande a "stake." Thence with meander of Rio Grande north westerly to intersection with the south boundary of N. half of fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 the N. E. corner of a claim post. Thence westerly along south boundary of N. half of S. E. quarter Sec. 9 17 28-100 chains to the west boundary of lot No. 3 Sec. 9 of the N. W. corner of claim, monument of stones; whence the N. W. corner of original claim bears N. 36 deg. west 8.70 chains distant. Thence south 10.00 chains to the place of beginning, containing 18½ acres, more or less, being that part of lot No. 3 Sec. 9 corresponding to fractional S. half of the N. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east.

This additional and amended location notice is made without waiver of any previous rights but to correct any error in prior location or record to secure all bounded overlapping claims and to secure all the benefits of section 2301 of the Compiled laws of 1897 of the Territory of New Mexico. The original location notice bears date April 7th, 1905, and is recorded in the office of the Probate

77 Clerk and Ex-Officio Recorder of said County of Dona Ana in Book 8 of Mining Locations: Page 503. This notice is posted on claim this 5th day of May, 1906.

J. H. McKNIGHT, *Locator.*

GEORGE LYNCH,

Witness.

Filed for record May 10th. A. D. 1906, at 4 P. M.

ISIDORO ARMIJO, *Recorder.*

Certificate.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, I. Armijo, the undersigned, Probate Clerk and Ex-Officio Recorder in and for the County of Dona Ana in the Territory of New Mexico, do hereby certify that the foregoing Additional and Amended Location Notice of the Lulu and Agnes Mining Claims are true and correct copies of the originals thereof, recorded in Book of Mining Claims No. 9, at page- 7 and 8, records of Dona Ana County, New Mexico.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, this the 8th day of November, 1909.

[SEAL.]

I. ARMIJO,

*Probate Clerk & ex-Officio Recorder,**Dona Ana Co., N. M.*

EXHIBIT "H."

Location Notice.

"Lynch."

Compared.

Notice is hereby given, To all whom it may concern, that I, J. H. McKnight, citizen of the United States, over age of twenty-one years, have located, and by these presents do locate twenty acres of placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in ——— Mining District, in County of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at quarter section corner between sections 9 and 16 Tp. 29 S. R. 4 east, the south west corner of claim, monument of stones. Thence north 20.00 chs. to N. W. cor. identical with N. W. corner of lot No. 4, monument of stones. Thence east on north boundary of lot No. 4—10.00 chs. to N. E. cor. monument of stones. Thence south 20.00 chs. to line bet. sections 9 and 16 the south east corner, a monument of stones where this notice is posted. Thence west along Section line 10.00 chs. to southwest corner, the place of beginning, being that portion of lot No. 4 corresponding to the W. half of the S. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east. Containing 20 acres.

Said land and claim to be known as the Lynch Placer Mining Claim.

Date- on the ground this 5 day of May, 1906.

J. H. MCKNIGHT, *Locator.*

GEORGE LYNCH,

Witness.

Filed for record May 10th. A. D. 1906, at 4 P. M.

ISIDORO ARMIJO, *Recorder.*

EXHIBIT "I."

Location Notice.

"Aurora."

Compared.

Notice is hereby given, To all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate 18 60-100 acres of placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District, in County of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at the N. E. cor. of the N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 S. R. 4 east, being the S. W. corner of claim a monument of stone, where this notice is posted. Thence north 20.00 chs. to north boundary of lot No. 4 Sec. 9 the N. W. cor. of claim a monument of stones. Thence east 15.00 chs. to right bank of Rio Grande, north east corner of claim, a post. Thence southerly with meander of right bank of Rio Grande along east boundary of lot No. 4 Sec. 9 to meander corner on right bank of Rio Grande between section- 9 and 16, to the south east corner, a post. Thence west along section line 11 25-100 chs. to the S. W. corner place of beginning. Containing 18 60-100 acres, being that portion of lot No. 4 lying between the east boundary of that portion of lot 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east and the Rio Grande.

Said land and claim to be known as the Aurora Placer Mining Claim.

Date- on the ground this 5 day of May, 1906.

J. H. McKNIGHT, *Locator.*

GEORGE LYNCH.

Witness.

Filed for record May 10th, A. D. 1906, at 4 P. M.

ISIDORO ARMIJO, *Recorder.*

EXHIBIT "J."

Location Notice.

"Tip Top."

Compared.

Notice is hereby given, To all whom it may concern that I, J. H. McKnight, citizen of the United States over the age of twenty-one

years have located and by these presents do locate twenty acres of placer mining land in accordance with the mining laws of the United States and the Territory of New Mexico, said land and claim lies and is situated in the County of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stone the S. E. corner of claim identical with the N. E. Corner of N. W. quarter of N. E. quarter of Section 16 Tp. 29, S. R. 4 east, thence north 20.00 chains to N. E. corner—a monument of stone—identical with the N. E. corner of that portion of Lot No. 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9. Thence west 10.00 chains to the N. W. cor. of claim—a monument of stone. Thence south 20.00 chains to the S. W. corner of claim—a monument of stone, where this notice is posted. Thence east along section line between 9 and 16—10.00 chains to place of beginning, containing 20 acres, being that portion of Lot No. 4 Sec. 9 Tp. 29 S. Range 4 east corresponding to east half of S. W. quarter of sec. 9, Tp. 29 S. Range 4 east.

Said land and claim to be known as Tip Top Placer Mining Claim.

Dated on the ground this 5th day of May, 1906.

J. H. MCKNIGHT, *Locator.*

GEORGE LYNCH,
Witness.

Filed for record May 10th, A. D. 1906, at 4 P. M.

ISIDORO ARMIJO, *Recorder.*

81

Certificate.

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

I, I. Armijo, the undersigned, Probate Clerk and Ex-Officio Recorder in and for the County of Dona Ana, in the Territory of New Mexico, do hereby certify that the foregoing Location Notices of the Aurora, Tip Top and Lynch, are true and correct copies of the originals thereof, recorded in Book of Mining Claims No. 9, at pages No. 9, 10 and 11, records of Dona Ana County, New Mexico.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this the 8th day of November, 1909.

[SEAL.]

I. ARMIJO,
Probate Clerk & ex-Officio Recorder,
Dona Ana Co., N. M.

EXHIBIT "N."

Mining Deed.

Compared.

J. H. McKnight

to

Los Angeles Pressed Brick Co.

Know all men by these presents, that I the undersigned, for a good and sufficient consideration to me paid in hand *paid* by the Los Angeles Pressed Brick Co., a corporation duly organized and existing under the laws of the State of California, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred, set over and assigned and do hereby grant, bargain, sell, transfer and set over to said Los Angeles Pressed Brick Co., its successors

and assigns all my right, title and interest in and to all
82 Placer Mining Claims heretofore located by me in Section
Nine (9), Township Twenty-nine (29) south, Range Four
(4) east, and named the Lulu, Agnes, Lynch, Tip Top and Aurora,
all being in Dona Ana County, New Mexico; and reference is
hereby made to such locations and the records thereof in said County
for further and more particular description; to have and to hold
the same to it and its successors and assigns.

In Witness Whereof I have hereunto set my hand and seal this
24th, day of November, 1906.

J. H. McKNIGHT.

STATE OF CALIFORNIA,

County of Los Angeles:

On this 26th, day of November, in the year one thousand nine hundred and six before me, Harriet Lawler, a Notary Public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared J. H. McKnight known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official seal, at Los Angeles in said County, the day and year in this certificate first above written.

[SEAL.]

HARRIETT LAWLER,

*Notary Public in and for Los Angeles
County, State of California.*

General.

Filed for record November 30, A. D. 1906, at 10:30 A. M.

ISIDORO ARMIJO, *Recorder.*

Certificate.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, I. Armijo, the undersigned, Probate Clerk and Ex-officio County Recorder in and for the County of Dona Ana in the Territory of New Mexico, do hereby certify that the foregoing Mining Deed from J. H. McKnight, to Los Angeles Pressed Brick Company, is a correct and true copy of the original thereof, recorded in Book of Mining Deeds No. 3, at page 638, records of Dona Ana, New Mexico.

In witness whereof, I have hereunto set my hand and official seal this the 8th day of November, A. D. 1909.

[SEAL.]

I. ARMIJO,
Probate Clerk & ex-Officio Recorder,
Dona Ana Co., N. M.

EXHIBIT "O."

This indenture made, This 20th day of October, 1908, between the Los Angeles Pressed Brick Co., a corporation existing under the laws of the State of California, the party of the first part, and J. H. McKnight, party of the second part.

Witnesseth: That in pursuance of a resolution duly passed by the Board of Directors of said corporation, at a meeting of said board of Directors, duly assembled on October 19th 1908, and, for and in consideration of the sum of ten (10.00) dollars, to be paid by said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part doth by these presents, grant, bargain, sell, transfer and set over to said party of the second part his heirs and assigns forever, all its right title and interest in and to all placer mining claims located by said party of the second part in Section Nine (9), Township Twenty-nine, (29) South, Range Four (4) East, and named the Lulu, Agnes, Lynch, Tip Top and Aurora, all being in Dona Ana County, Ter. of N. M. and reference is hereby made to said locations and the records thereof, in said county, for the further and more particular description.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

In witness whereof, the said party of the second part hath by resolution of its board of directors, caused its corporate name and seal to be hereunto affixed, and hath by said resolution, caused these presents to be executed by its president and secretary.

[SEAL.]

LOS ANGELES PRESSED BRICK CO.,
By CHAS. H. FROST, *Its President*,
By WEST HUGHES, *Its Secretary*.

STATE OF CALIFORNIA,

County of Los Angeles, ss:

On the 20th day of October, 1908, before me, E. F. Brittan, a Notary Public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared Chas. H. Frost, known to me to be the President, and West Hughes, known to me to be the Secretary of the Los Angeles Pressed Brick Co., the Corporation described in, and that executed the within and annexed instrument, and they each acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and have
85 affixed my Official Seal, in my office, in the county of Los Angeles, State of California the day and year in this certificate first above written.

E. F. BRITTAN,

*Notary Public in and for Los Angeles
County, State of California.*

STATE OF CALIFORNIA,

County of Los Angeles, ss:

On this 21st day of April, A. D. 1909, before me appeared Chas. H. Frost, to me personally known, who being by me personally sworn did say, that he is the President of the Los Angeles Pressed Brick Company, a corporation, and that the seal affixed to said instrument is the corporation seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of Directors, and said Chas. H. Frost acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[SEAL.]

MARY H. HUCHNER,

Notary Public, Los Angeles County, California.

(Endorsed:) Deed—Los Angeles Pressed Brick Company to J. H. McKnight, No. 4560 Reception—Recorded—Compared—Indexed. Territory of New Mexico—County of Dona Ana. Filed for Record in my office this 10 day of May, 1909—at 9 o'clock A. M., and
86 duly recorded in book No. 4 of Mining Deeds at Page 60 records of Dona Ana County, New Mexico.

[SEAL.]

ISIDORO ARMIJO,

*Probate Clerk and ex-Officio Recorder,
Dona Ana Co., N. M.*

EXHIBIT "Q."

Proof of Labor.

Compared.

International Aluminum and Hortense Placers.

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

W. F. Robinson, of lawful age, being first duly sworn upon oath, deposes and says, that he is the President of the El Paso Brick Company and Ex-Officio Manager thereof, and has been for more than three years last past; that the El Paso Brick Company is the owner of the possessory right in and to those three certain Placer Claims composing the Aluminum Placer Group, to-wit: The International Placer, the Aluminum Placer and the Hortense Placer, situated in the Brick Land Mining District of Dona Ana County, New Mexico; that for the year of A. D. 1903 there was done and performed by and for the El Paso Brick Company in work upon said claims and actually developing the same, more than \$5000.00 worth, to-wit: Upon the International Placer there was constructed a 1-4 of a mile of Railroad track for the conveying of machinery and necessary implements, fuel, etc., to said premises, and the hauling therefrom, brick made and manufactured on said premises and excavating and leveling for brick manufacturing purposes, 87 all of which said work and labor was done between the 1st day of January, 1903, and the 31st day of December, 1903; and inured alike in benefits for brick purposes to all three of said claims, composing said group, to-wit: International Placer, Aluminum Placer and the Hortense Placer, and further deposing says, that in addition thereunto, there was done, and performed by and for the El Paso Brick Company upon each of the Aluminum Placer and Hortense Placer in actual developing, leveling and excavating for brick manufacturing purposes, work of value and cost to said company of more than \$100.00 each, between the said first day of January, 1903, and the 31st day of December, 1903, and further deposing upon oath says, that for the year A. D. 1904, was done and performed in actual work upon said claims in actual development of same, of value more than \$5000.00, to-wit: Upon the International Placer Claim in constructing a brick hose house for the manufacture of brick and in developing excavating and leveling said claim for the manufacture of brick between the first day of January, 1904, and the 31st day of December, 1904, by and for said El Paso Brick Company which said work and labor so performed is in the nature of permanent improvements upon said premises and inures alike to all three of said Placer Claims, composing the said Aluminum Placer group, to-wit: The said International Placer, the Aluminum Placer and the Hortense Placer, and that in addition thereto, between said dates there was done and

performed by and for the El Paso Brick Company, upon each, the said Aluminum Placer and the Hortense Placer, in excavating, developing and leveling said claims for brick purposes in actual value of work and cost, more than \$100.00 on each of said claims.

W. F. ROBINSON.

88 Subscribed and sworn before me this the 25th day of April, A. D. 1905.

[SEAL.]

NORTON MOORE,

*Notary Public in and for Dona Ana
County, New Mexico.*

Filed for record this 8th day of June, A. D. 1905, at 10 o'clock
A. M.

ISIDORO ARMIJO, *Recorder.*

Ex. R.

Proof of Labor.

"Aluminum Placer Group."

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

W. F. Robinson, affiant of lawful age, having first been duly sworn, on oath says that he is the President of the El Paso Brick Company and ex-officio Manager thereof, and he has been for more than a year last past; and that during that time he has been continuously engaged in the business of said company on the mining claims hereinafter named; and that the said El Paso Brick Company is the owner of the possessory right in and to those three certain Placer Claims composing the Aluminum Placer group, to-wit: the International Placer, the Aluminum Placer and the Hortense Placer, situated in the Brickland Mining District, in Dona Ana County, New Mexico; and that for the year of A. D. 1906 there was done and performed by and for the El Paso Brick Company in work upon said claims and actually developing and tending to develop same, more than Five Thousand Two Hundred Dollars (\$5200.00) worth, to-wit: Upon the International Placer Claim there

89 was so constructed two brick kilns for the purpose of burning brick manufactured on said claims and from shale excavated and mined on said claim, at a cost of and reasonably worth Three Thousand Dollars (\$3000.00) and shale was excavated and mined on said claim for the purpose of manufacturing brick thereon at a cost and reasonable expenditure of Two Thousand Dollars (\$2,000.00) and that the work and labor of building said brick kilns insured alike in benefits for brick purposes to all three of said claims composing said group, to-wit: The International Placer, the Aluminum Placer and the Hortense Placer; and that in addition to said work and labor there was constructed by and for the said

El Paso Brick Company a quarter of a mile of road on and across the Aluminum Placer and on to the Hortense Placer for the purpose of hauling to the manufacturing plant shale to be excavated on said Aluminum Placer and on said Hortense Placer; and that said road was constructed at a cost and reasonable expenditure of Two Hundred dollars (\$200.00), to-wit: \$100.00 on said Aluminum Placer and \$100.00 on said Hortense Placer; and that the construction of said road tends to develop alike each of said two claims last named; and that all of said work and labor hereinbefore set forth, was done and performed between the 1st day of January, A. D. 1906, and the 31st day of December, A. D. 1906; and that said work was performed by affiant and E. Hewitt Rodgers and the rest of the working force of said Company.

W. F. ROBINSON.

Sworn to and subscribed before me this 29th day of December, A. D. 1906.

[SEAL.]

J. H. PAXTON,
*A Notary Public in and for Dona Ana
County, New Mexico.*

Filed for record December 31st, A. D. 1906, at 11 A. M.

ISIDORO ARMIJO, *Recorder.*

90

Certificate.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, I. Armijo, the undersigned, Probate Clerk and Ex-Officio County Recorder in and for the County of Dona Ana, in the Territory of New Mexico, do hereby certify that the foregoing proofs of Labor on the International, Aluminum and Hortense Placers, covering the years of 1903, 1904 and 1906, are true and correct copies of the originals of record in Book of Proofs of Labor No. 1, at pages 596 and 655, records of Dona Ana County, New Mexico.

In Witness whereof, I have hereunto set my hand and affixed my official seal the 8th day of November, A. D. 1909.

[SEAL.]

I. ARMIJO,
*Probate Clerk & ex-Officio Recorder,
Dona Ana Co., N. M.*

EXHIBIT No. "1."

Location Notice.

Hortense Placer Claim.

Notice is hereby given that we, E. Hewitt Rodgers, Edward Rodgers, Eb. Rodgers, A. F. Rodgers, E. C. Lemen, H. G. Ross, W. F. Robinson, and James H. White, the undersigned citizens of the United States, have this 31st day of March, 1902, located, and do

hereby locate in compliance of the Mining Laws of the United States, 157.36 acres of valuable placer deposits, consisting of Aluminum, iron, kaolin, fireclay, shale and manganese, within the limits of the following described tract of unsurveyed Public Lands of the United States, being the southern portion of Dona Ana Co. Ter. of

91 N. M. and situated on the right or south bank of the Rio Grande about four miles westerly from El Paso, Texas, bounded and described as follows:

Commencing at corner No. 1, a rock mound and corner post, upon which a true copy of this notice is posted, said corner being situated 70 feet northerly from the center line of the El Paso & Southwestern Railroad, at Engineer's station No. 11199 x 70. The above corner being also at or near the N. W. Corner of the Aluminum Placer Claim; thence N. 82 deg. 22' W. 850 feet to corner No. 2, a rock mound and post; thence S. 67 deg. W. 811 feet to corner No. 3, a rock mound and post situated 100 feet northerly from Engineer's station 11184 x 20, of the said El Paso & Southwestern Railroad; thence S. 62 deg. 05' W. 1170 feet to corner No. 4, a rock mound and post situated 111 feet northerly from center line of said railroad at Engineer's station 11172 x 50; thence N. 16 deg. 15' W. 515 feet to corner No. 5, a rock mound and post situated 152 feet southerly from Center line of New Southern Pacific Railroad at Engineer's station 22 x 30, thence N. 2 deg. 37' W. 900 feet to corner No. 6, a rock mound and post situated 18 feet from Right-of-way line (South side) of Southern Pacific Railroad; thence N. 37 deg. 10' E. 800 feet to corner No. 7, a rock mound and post situated 10 feet Southerly from said R. of W. line; Thence N. 51 deg. 6' E. 1450 feet to corner No. 8, a rock mound and post on said R. of W. line (South side); thence N. 62 deg. 10" E. 960 feet to corner No. 9, a rock mound and post; thence S. 71 deg. 10' E. 881 feet to corner No. 10, a rock mound and post; thence S. 51 deg. 28' E. 308 feet to a corner No. 11, a rock mound and post; situated on South line of said Right-of-way line and being also the N. E. Corner of the Aluminum Placer Claim; thence S. 18 deg. 36" W. 2280.2 feet

92 to corner No. 1 and place of beginning. From corner No. 9, above mentioned monument No. 3, on the International Boundary line bears S. 51 deg. 15' W. about 2½ miles distant, and a mountain knob bears from the same corner No. 9, 19 deg. 40' E. about — miles distant.

All bearings given are magnetic. All corners are rock mounds about 3 feet high with 2 x 3 post in center marked with name of claim and No. of corner. The name of this claim is to be known as the Hortense Mining Claim and contains 157.36 acres. Located and staked March 31st, 1902.

E. HEWIT RODGERS,
EDWARD RODGERS,
A. F. RODGERS,
E. C. LEMEN,
H. G. ROSS,
W. F. ROBINSON,
JAMES H. WHITE.

Locators.

Witness:

A. G. BLAKE.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

Filed for record in my office this 30th day of April, A. D. 1902, at 9 o'clock A. M., and duly recorded in book of Mining Claims No. 8 at page 25, records of Dona Ana County, N. M.

[SEAL.]

ISIDORO ARMIJO,

*Probate Clerk & ex-Officio Recorder,**Dona Ana Co., N. M.*

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, Isidoro Armijo, the undersigned Probate Clerk and Ex-Officio Recorder of Dona Ana County, New Mexico, do hereby certify that the foregoing "Location Notice Hortense Placer Claim" is a full, true and correct copy from the original thereof, Recorded in 93 Book of Mining Claims No. 8, at Page 25, records of Dona Ana County, New Mexico.

In Witness Whereof, I have hereunto set my hand and official seal at my office in Las Cruces, New Mexico, this 1st day of November, A. D. 1909.

[SEAL.]

ISIDORO ARMIJO,

*Probate Clerk & ex-Officio Recorder,**Dona Ana Co., N. M.,*By J. F. NEVARES, *Deputy.*

"EXHIBIT A."

Location Notice.

"Aluminum."

Notice is hereby given that we, E. Hewitt Rodgers, Edward Rodgers, Eb. Rodgers, W. F. Robinson, B. Leibman, H. G. Ross, W. J. Harris, James H. White, citizens of the United States, have this fifth day of December, A. D. 1900, discovered a valuable placer deposit consisting of aluminum, iron, kaolin, fire clay and manganese within the limits of the following described of unsurveyed public lands of the United States, being the southern portion of Dona Ana County, Territory of New Mexico, west of the Rio Grande above the Southern Pacific Railroad bridge.

By virtue of such discovery, we have located and hereby claim the same, containing one hundred and sixty acres.

Said claim is hereby named the "Aluminum Placer Claim."

This claim is marked upon the ground as follows: At the southeast of said tract, about 2,200 feet north of the north boundary line of Mexico, and about 1,800 feet west of the Southern Pacific railroad bridge, we have placed a stake in a mound of rock (Marked 94 No. 1 S. E. corner) from which a culvert under the S. P. Ry. bears northeasterly 635 feet distant; thence west 1,000 feet to a stake in mound of rock (Marked No. 2) on a small hill on

south side of Cañon; thence northwesterly 2,600 feet to stake in mound of rock in gulch southwest of old incline shaft (Marked No. 3 S. W. corner); thence northeasterly 2,400 feet to stake in mound of rock on eastern slope of hill at S. P. R. R. fence, about 60 feet northerly from telegraph pole marked "1290." Said stake marked "No. 4;" thence southeasterly parallel with the S. P. R. R. 4,000 feet to stake monument No. 1 and place of beginning.

This notice is posted at stake and mound marked "No. 1" at southeast corner. Dated and posted on the ground this 5th day of December, 1900.

E. HEWIT RODGERS,
EDWARD RODGERS,
EB. RODGERS,
W. F. ROBINSON,
W. J. HARRIS,
H. G. ROSS,
JAMES H. WHITE,

Locaters.

Witness to the location:

L. H. DAVIS.

Filed for record this 10 day of January A. D. 1901, at 8:40 o'clock A. M.

ISIDORO ARMIJO, *Recorder,*
By CELSO C. AMADOR, *Deputy.*

95

EXHIBIT No. 1 "A."

Amended Location Notice of the Hortense Placer Mining Claim.

No. 2461.

Compared Jno. to L.

Know all men *men* by these presents, That, whereas, Edward Rodgers, Eb Rodgers, A. F. Rodgers, E. C. Leman, H. G. Ross, James H. White and W. F. Robinson, did on the 31st day of March, A. D. 1902, locate the Hortense Placer Mining Claim in the Brickland Mining District in the County of Dona Ana, Territory of New Mexico, having theretofore discovered valuable placer mining deposits within the confines of such Mining Claim, and did on the 30th day of April, A. D. 1902, post a notice of such location in a conspicuous place upon said claim and did thereafter and at 9 o'clock A. M. of the 30th day of April, A. D. 1902, cause a copy of such location notice to be recorded in the office of the Recorder of the said County of Dona Ana, at page 25 of Book 8, of Mining Location Notices, and did and performed all other acts necessary to constitute a valid location of a placer mining claim under the laws of the United States and the Territory of New Mexico, and

Whereas, the undersigned, The El Paso Brick Company, a corporation organized under the laws of and a citizen of the State of Texas

and authorized to do business in the Territory of New Mexico, is now the owner by mesne conveyances of said Mining Claim and all of the rights, title and interest of the original locators therein and in the ground covered thereby and the minerals therein contained.

96 Now, then, the undersigned, said The El Paso Brick Company, for the purpose of making the surface boundaries of said mining claim to conform to the lines of the subsequent public land surveys of the United States, and to more fully comply with the statutes in such cases made and provided, and especially reserving all and waiving none of the rights acquired under and by virtue of such original location and the mesne conveyances to the undersigned, and claiming any and all rights which the undersigned may or can acquire under and by virtue of this Amendatory Location, does hereby make this Amendatory Location of the said Hortense Placer Mining Claim, and to that end makes the following statement:

Said Mining Claim is located in Brickland Mining District in Dona Ana County, Territory of New Mexico, and

The N. half of S. W. quarter the N. half of the S. W. 9, Township 29 Range 4 East, New Mexico Principal Meridian, and the E. half of the S. E. quarter of the S. E. quarter of Section 8, said Township and Range, all aggregating 150 acres. From the S. E. corner of the S. E. quarter of the S. W. quarter of said Section 9, the center of International Boundary Monument No. 2 bears South 3201.66, and East 888.42 feet. Containing 150 acres, more or less, all of which contain valuable deposits of mineral.

This claim shall be known as the Hortense Mining Claim.

Signed, dated and posted on the ground, this 12th day of September, A. D. 1908.

THE EL PASO BRICK COMPANY,
By W. F. ROBINSON, *President*.

Attest:

E. HEWIT RODGERS, *Secretary*.

97 Witness:

LOUIS M. CASE.
CLINTON R. FOLK.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, Isidoro Armijo, the undersigned, Probate Clerk and Ex-Officio Recorder of Dona Ana County, New Mexico, do hereby certify that the foregoing "Amended Location Notice of the Hortense Placer Mining Claim" is a full, true and correct copy from the original thereof, recorded in Book of Mining Claims No. 9, at Pages 287 Records of Dona Ana County, New Mexico.

In witness whereof, I have hereunto set my hand and official seal at my office in Las Cruces, New Mexico, this 1st day of November A. D. 1909.

[SEAL.]

ISIDORO ARMIJO,
Probate Clerk and ex-Officio Recorder of
Dona Ana County, New Mexico,
By J. F. NEVARES, *Deputy*.

Amended Location Notice of the Aluminum Placer Mining Claim.

No. 2492.

Compared Jno. to L.

Know all men by these presents, That, Whereas, E. Hewit Rodgers, Edward Rodgers, Eb. Rodgers, W. F. Robinson, B. Leibman, H. G. Ross, W. J. Harris and James H. White, did on the 5th day of November, A. D. 1900, locate the Aluminum Placer Mining Claim in the County of Don Ana, Territory of New Mexico, having theretofore discovered valuable placer mineral deposits within the confines of such mining claim, and did on the 5th day of November, A. D. 1900, post a notice of such location in a conspicuous place upon said claim, and did thereafter and at 8:40 o'clock A. M., of the 10th day of January, A. D. 1901, cause a copy of such location notice to be recorded in the office of the Recorder of said County of Dona Ana, at page 396, of Book 7, of Mining Location Notices, and did and performed all other acts necessary to constitute a valid location of a placer mining claim under the laws of the United States and the Territory of New Mexico, and,

Whereas, the undersigned, The El Paso Brick Company, a corporation organized under the laws of and a citizen of the State of Texas and authorized to do business in the Territory of New Mexico, is now owner by mesne conveyances of said Mining Claim and all of the rights, title and interest of the original locators therein and in the ground covered thereby and the minerals therein contained.

Now, then, the undersigned, said The El Paso Brick Company for the purpose of making the surface boundaries of said mining claim conform to the lines of the subsequent public land surveys of the United States, and to more fully comply with the Statutes in such cases made and provided, and especially reserving all and waiving none of the rights acquired under and by virtue of such original location and the mesne conveyances to the undersigned, and claiming any and all the rights which the undersigned may or can acquire under and by virtue of his Amendatory Location, does hereby make this Amendatory Location of the said Aluminum Placer Mining Claim, and to that end makes the following statement:

Said Mining Claim is located in Brickland Mining District in Dona Ana County, Territory of New Mexico, and is more particularly described as follows:

The N. half of the N. W. quarter of the N. E. quarter of Section 16, Township 29, Range 4 East, New Mexico.

Principal Meridian, and also lots 3 and 4 Section No. 9, of said Township and Range, said lots containing respectively in the order named, 33.04 acres and 58.60 acres, all of said lots and fractional part of said Section containing in the Aggregate 111.64 acres from S. W. corner of Lot No. 4 of said Section 9, the center of International Boundary Monument No. 2 bears South 3201.66 feet and East 888.42 feet, containing 111.64 acres, more or less, all of which contain valuable deposits of mineral.

This Claim shall be known as the Aluminum Mining Claim.
Signed, dated and posted on the ground, this 12th day of September, A. D. 1908, at 11:30 o'clock.

THE EL PASO BRICK COMPANY,
By W. F. ROBINSON, *President*.

Attest:

E. HEWIT RODGERS, *Secretary*.

Witness-:

LOUIS M. CASE.
CLINTON R. FOLK.

Filed for record Sept. 22 A. D. 1908 at 10:30 A. M.

ISIDORO ARMIJO, *Recorder*.

TERRITORY OF NEW MEXICO,

County of Dona Ana, ss:

I, Isidoro Armijo, the undersigned, Probate Clerk, and Ex-Officio Recorder of Dona Ana County, New Mexico, do hereby certify that the foregoing Amended Location Notice of the Aluminum Mining Claim, is a full, true and correct copy from the original thereof, recorded in Book of Mining Claims No. 9 at pages 288 Records of Dona Ana County, New Mexico.

In witness whereof, I have hereunto set my hand and official seal at my office in Las Cruces, New Mexico, this 1st day of November, A. D. 1909.

[SEAL.]

ISIDORO ARMIJO,

*Probate Clerk and ex-Officio Recorder of
Dona Ana County, New Mexico,
By J. F. NAVARES, Deputy.*

EXHIBIT No. 5.

Tabulated Statement of Work Done on the Lulu, Agnes, Tip-Top, Lynch, and Aurora Placer Claims by J. H. McKnight et al., from 1905 to 1908, Inclusive.

	Lulu.	Agnes.	Tip Top.	Lynch.	Aurora.	Total.
Prior to						
Dec. 1906.	No. 41 \$7.00	No. 13 \$8.00	.....	.....	.....	\$15.00
	No. 42 \$7.00	No. 19 \$5.00	.....	No. 19 \$5.00	.....	67.80
1906.	No. 43 \$36.80	No. 19 \$5.00				
	No. 19 \$5.00					
1907.	No. 14 \$249.15	No. 12 \$85.00	No. 8 \$14.00	No. 11 \$8.00	.....	\$249.15
	No. 44 \$52.25		No. 9 \$21.00	.....	.....	219.50
1908.			No. 10 \$8.00			
			No. 15 \$31.25			
	\$357.20	\$107.00	\$74.25	\$13.00		\$551.45

101

Lulu Placer.

Work Done by J. H. McKnight et al. upon the Lulu Placer.

No. 41. Shaft 4 x 6 ft., 8 ft. deep 7 cu. yds. excavated at \$1.00 per yd. \$7.00

This piece of work was done prior to Dec. '06. (?)

No. 42. Trench 2.8 ft. average width x 0.9 ft. average depth x 72 ft. long, 7 cu. yds. excavated at \$1.00 per yd. \$7.00

No. 43. Open Cut 5 ft. wide x 11 ft. face, 12 ft. long, 12.2 cu. yds. and a tunnel 4 x 6 ft. 7 ft. long, 6.2 cu. yds. total of 18.4 cu. yds. at \$2.00 per yd. \$36.80

No. 19. Trail (on Lulu, Agnes & Lynch) \$5.00

Nos. 42, 43 and 19 were made by H. Morton in Dec. '96 & Jan. '07.

No. 44. Open cut 40 ft. Wide, 6 ft. face and 13 ft. long 57.7 cu. yds. Open Cut 5 ft. wide, 12 ft. face and 16 ft. long 17.7 cu. yds. to a tunnel 4 x 5 1-2 ft., 6 ft. long, 5 cu. yds. Total of 80.4 cu. yds. at 65c. per yd. \$52.25

No. 14. Open Cut and Tunnel. Open Cut 4 ft. wide, 9 ft. face, 17 ft. long, 11 cu. yds. at 65c., \$7.15. Tunnel 3.3 x 6.5 ft. and 121 ft. long at \$20.00 per ft., \$242.00, total \$249.15

No. 44 was made in 1908.

No. 14 was made in 1907 & '8.

The Lulu Placer was located April 7th, 1905, and is defective as to location with reference to some natural object or permanent monument. Amended location was made May 5th, 1906.

102

Agnes Placer.

Work Done by J. H. McKnight et al. upon the Agnes Placer.

No. 13. Shaft 6 x 6 ft., deep, 8 cu. yds. at \$1.00 per yd. \$8.00

This piece of work was done prior to Dec. '06. (?)

No. 3. Open Cut 2.7 ft. average width x 2.0 ft. average depth x 45 ft. long, 9 cu. yds. excavated at \$1.00 per cu. yd. \$9.00

No. 19. Trail (on Lulu, Agnes & Lynch) \$5.00

Nos. 3 & 19 were made by H. Morton in Dec. 1906 & Jan. 1907.

No. 12. Open Cut one section of which is 3.5 ft. average width x 4.6 ft. average depth x 50 ft. long, 2,988 cu. yds. another section is 4.3 ft. average width x 37 ft. average depth x 60 ft. long, 35.4 cu. yds.; and another section is 4 ft. average width x 2.5 ft. average depth x 53 ft. long, 19.6 cu. yds.; total of 85 cu. yds. at \$1.00 per cu. yd. \$85.00

No. 12 was made in 1908.

The Agnes Placer was located April 7th 1905, and is defective as to location with reference to some natural object or permanent monument. Amended location was made May 5th, 1906.

Tip Top Placer.

Work Done by J. H. McKnight et al. upon the Tip Top Placer.

103	No. 8. Open Cut 5 ft. wide x 10 ft. face, 15 ft. long, 14 cu. yds. excavated at \$1.00 per cu. yd.	\$14.00
	No. 9. Open Cut 5 ft. wide 9 ft. face and 13 ft. long, 11 cu. yds. and a tunnel 4 x 7 ft., 10 ft. long, 10 cu. yds. total 21 cu. yds. at \$1.00 per cu. yd.	\$21.00
	No. 10. Open Cut 2.8 ft. average width x 2.25 ft. average depth x 33 ft. long, 8 cu. yds. excavated at \$1.00 per cu. yd.	\$8.00
	No. 15. Open Cut and Tunnel. Open Cut 5 ft. wide x 10 ft. face x 22 ft. long, 20.4 cu. yds. at 65c. per cu. yd. \$13.25; Tunnel 5 x 6 ft., 16 ft. long, 18 cu. yds. at \$1.00 per cu. yd. \$18.00, total	\$31.25

The Tip Top Placer was located May 5th, 1906.

Nos. 8, 9, 10 & 15 were made in 1908.

Lynch Placer.

Work Done by J. H. McKnight et al. on the Lynch Placer.

No. 19.	Trail (on Lulu, Agnes & Lynch)	\$5.00
---------	--------------------------------------	--------

No. 19 was made by H. Morton in Dec. 1906 & Jan. 1907.

No. 11.	Open Cut 3.2 ft. average width x 1.9 ft. average depth x 37 ft. long, 8 cu. yds. at \$1.00 per cu. yd.	\$8.00
---------	--	--------

No. 11 was made in 1908.

The Lynch Placer was located in May 5th, 1906.

Aurora Placer.

Work Done by J. H. McKnight et al. upon the Aurora Placer.

104	The Aurora Placer was located May 5th, 1906.	
-----	--	--

EXHIBIT No. 7.

No. 11226.

C. F. Curry, Secretary of State.

J. Hoesch, Deputy.

State of California.

Department of State.

I, C. F. Curry, Secretary of State, of the state of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of "The Los Angeles Pressed Brick Company" with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness My Hand and the Great Seal of the State at office in Sacramento, California, the 30 day of October, A. D. 1909.

[SEAL.]

C. F. CURRY,

*Secretary of State,*By J. HOESCH, *Deputy.**Articles of Incorporation of the Los Angeles Pressed Brick Company.*

Know All Men by These Presents: That we, the undersigned, a majority of whom are citizens and residents of the *the* State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the state of California.

105 And We Herely Certify:

First, That the name of said corporation shall be Los Angeles Pressed Brick Company.

Second, That the purposes for which it is formed are:

To manufacture and sell pressed brick, fire, paving and other kinds of brick, roofing tiles, fire proofing terra cotta and other clay products; to mine, buy, sell and deal in coal, clay, gypsum and other minerals;

To manufacture, purchase, or otherwise acquire goods, wares, merchandise and personal property, rights, franchises and assets of every kind, and the liabilities of any person, firm, association or corporation, either wholly or partly, and to pay for the same in cash, stock or bonds of the corporation, or otherwise;

To enter into, make perform and carry out contracts of every kind and for any lawful purpose, with any person, firm, association or corporation;

To borrow or raise money without limit as to the amount by the use of *or* debentures or debenture stock, or in any such other manner as the corporation may see fit;

To draw, make, accept, indorse, discount, execute and issue prom-

issory notes, bills of exchange, warrants, bonds, debentures and other negotiable or transferable instruments;

To take out patents, acquire those taken out by others, acquire or grant licenses in respect to patents, or work, transfer or do whatever else with them may be thought fit;

To conduct business in any of the States, Territories, Colonies or Dependencies of the United States, in the District of Columbia, and in any and all foreign countries, to have one or more offices
106 therein, and to hold, purchase, mortgage lease and convey or otherwise dispose of real and personal property, without limit as to amount therein, but always subject to the laws thereof;

To remunerate any person or corporation for services rendered, or to be rendered in placing or assisting to place or guaranteeing the placing of any of the shares of stock of the corporation, or any debentures or other securities of the corporation, or in or about the formation or promotion of the corporation or in the conduct of its business;

Subject to the provisions of law to purchase, hold and reissue the shares of its capital stock;

To do any and all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world.

The foregoing clauses shall be construed both as objects and powers.

In general to carry on any other business in connection with the foregoing, whether manufacturing or otherwise.

Third. That the place where the principal business of said corporation is to be transacted is in Los Angeles, State of California.

Fourth. That the term for which said corporation is to exist is fifty years from and after the date of its incorporation.

Fifth. That the number of directors or trustees of said corporation shall be five (5), and that the names and residences of the directors or trustees who are appointed for the first year and to serve until the election or qualification of such officers, are as follows, to-wit:

107

Names.

Residences.

C. H. Frost.....	Pasadena, Los Angeles Co., Cal.
W. C. Patterson.....	Los Angeles, Cal.
I. N. Van Nuys.....	Los Angeles, Cal.
H. West Hughes.....	Los Angeles, Cal.
Henry Obee.....	Los Angeles, Cal.

Sixth. That the amount of the capital stock of said corporation is two hundred and fifty thousand (250,000.00) dollars and the number of shares into which it is divided is twenty-five hundred (2500) of the par value of one hundred (100.00) dollars each. Of said stock one thousand (1000) shares shall be preferred stock, and the balance of fifteen hundred (1500) shares shall be common stock. The preferred stock shall not be entitled to vote; and all

holders of preferred stock shall by virtue of their acceptance thereof be deemed to have waived all statutory rights to vote the same, and all holders of common stock shall be deemed to have consented to such waiver. Said preferred stock may be issued as and when the board of directors shall determine and shall entitle the holder thereof to receive out of the next earnings, and the corporation shall be bound to pay a fixed cumulative dividend at the rate of but not exceeding, six per centum per annum, payable on the tenth day of January & July of each year, before any dividend shall be set apart or paid on the common stock; Provided, however, that whenever a dividend is paid on the preferred stock the directors shall have power in their discretion to declare and pay a dividend for a like period on the common stock.

The holders of preferred stock shall in case of liquidation or dissolution of the corporation before any amount shall be paid to the holders of the general or common stock to be entitled to be paid in full.

108 Seventh. The amount of Capital stock which has actually been subscribed is seventy-five hundred (7500.00) dollars and the following are the names of the persons to whom the same has been subscribed, to-wit:

Name of subscribers.	No. of shares stock.	Amount.
C. H. Frost.....	Preferred 10.....	\$1000.00
" " ".....	Common 15.....	1500.00
W. C. Patterson.....	Preferred 10.....	1000.00
" " ".....	Common 15.....	1500.00
H. West Hughes.....	Preferred 10.....	1000.00
" " ".....	Common 15.....	1500.00
I. N. Van Nuys.....	Preferred 10.....	1000.00
" " ".....	Common 15.....	1500.00
Henry Obce.....	Preferred 10.....	1000.00
" " ".....	Common 15.....	1500.00

In witness whereof, we have hereunto set our hand and seals this 12th day of March A. D. 1903.

CHAS. H. FROST.	[SEAL.]
W. C. PATTERSON.	[SEAL.]
W. WEST HUGHES.	[SEAL.]
I. N. VAN NUYS.	[SEAL.]
HENRY OBEE.	[SEAL.]

STATE OF CALIFORNIA,

County of Los Angeles, ss:

On this 12th day of March A. D. 1903, before me, Nathan F. Bundy a notary public in and for said County, residing therein, duly commissioned and sworn, personally appeared C. H. Frost, W. C. Patterson, H. West Hughes, I. N. Van Nuys and Henry Obce, known to me to be the persons who subscribed to the within instrument and acknowledged that they executed the same.

109 In witness whereof, I have hereunto set my hand and affixed my Official seal the day and year last above written.

[SEAL.]

NATHAN P. BUNDY,
Notary Public in and for the County of
Los Angeles, State of California.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

No. 4668.

I, C. G. Keyes, County Clerk and Ex-Officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original articles of incorporation of the "Los Angeles Pressed Brick Company" on file in my office, and that I have carefully compared the same with the original.

In witness whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 13th day of March, A. D. 1903

[SEAL.]

C. G. KEYES,
County Clerk,
By SAM KUTZ, Deputy.

(Endorsed:) Filed March 13, 1903. C. G. Keyes, Clerk, by Sam Kutz, Deputy.

(Endorsed:) Filed in the office of the Secretary of the State the 27th day of March, A. D. 1903. C. F. Curry, Secretary of State. By J. Hoesch, Deputy, Recorded Book 144, page 169.

Which said transcript of testimony etc., is endorsed upon the back in the words and figures following, to-wit:

110 No. 2849. J. H. McKnight vs. El Paso Brick Company. Testimony. Third Judicial District Court, County of Dona Ana. Filed in my office this 13th day of Dec. 1909. Jose R. Lucero, Clerk. By John Lemon, Deputy.

In the District Court of the Third Judicial District of the Territory of New Mexico within and for the County of Dona Ana.

No. 2849. Civil.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendant.

I, the undersigned, Associate Justice of the Supreme Court of the Territory of New Mexico, and Presiding Judge of the Third Judicial District Courts, do hereby certify that I am the Judge before whom the above entitled cause was tried; that M. A. Frazer, was the official Stenographer who reported said cause, that the annexed and foregoing transcript of testimony and evidence is the transcript of the

testimony and evidence in said cause and contains, with the records, exhibits and documentary evidence therein referred to and identified, all of the testimony offered, given or introduced in said cause by the respective parties, upon the trial thereof; and all objections and motions of the parties thereto or any part thereof; all rulings of the Court upon such objections and motions; and all exceptions to such rulings.

111 Witness my official signature at Las Cruces, New Mexico,
Attested by the Clerk of said court this 1st day of July A. D.
1911.

FRANK W. PARKER,

Associate Justice, Judge, etc.

And afterwards, to-wit: on the 17th day of December, A. D. 1910, there was filed by the Clerk special findings requested by defendant, which are in words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico for Dona Ana County.

JOHN H. MCKNIGHT

vs.

EL PASO BRICK COMPANY.

In the foregoing case the defendant requests the Court to find the following facts and conclusions of law:

First. That on the 5th day of December, 1900, E. Hewitt Rodgers, Edward Rodgers, Eb. Rodgers, W. F. Robinson, B. Leibman, H. G. Ross, W. J. Harris, and James H. White duly located upon the unsurveyed public domain in the County of Dona Ana Territory of New Mexico, a certain placer mining claim containing about one hundred and sixty acres, known as the Aluminum Placer Claim, having first discovered valuable mineral deposits within the boundaries thereof; that on or about the 31st day of March, 1902, E. E. Hewitt Rogers, Edward Rogers, A. F. Rogers, Eb. Rogers, E. S. Lehman, H. G. Ross, W. F. Robinson, and James H. White also located a certain placer mining claim upon public domain in the county of Dona Ana, Territory of New Mexico, containing

112 about one hundred and sixty acres, known as the Hortense Placer claim, adjoining the said Aluminum Claim, having first discovered valuable mineral deposits thereon, and that both of said sets of locators thereafter did and caused to be done upon each of such claims all the various acts and things required by the laws of the United States and the Territory of New Mexico, so that each of such claims became after the location thereof duly subsisting and existing mining locations, and that each of the same was thereafter by deed of all parties interested duly transferred and conveyed to the defendant, and that said defendant became the lawful owner of the rights of such locators in and to each of such mining claims by virtue of said deed of transfer and conveyance.

Second. That there is no evidence to show what, if any, labor was done or performed by either said locators of said Aluminum and Hortense Placer Mining Claims, or said defendant as the grantee thereof, previous to the year 1903, but the undisputed evidence shows that in the years 1903 and 1904 One hundred dollars' worth of mining labor was done and performed upon each thereof, for each of said years, by the defendant.

Third. That on or about the 1st day of April, 1905, the Plaintiff entered into and upon a portion of such Hortense and Aluminum mining claims so claimed by the defendant and erected monuments thereupon and caused a location notice to be posted upon each thereof, and shortly thereafter to be filed and recorded in the office of the Probate Clerk and Ex-Officio Recorder of Dona Ana County, that at the time of the doing of such acts by plaintiff both the Hortense and Aluminum mining claims were valid subsisting locations on the land embraced thereon and the same nor any part thereof, were not subject to location or relocation by the plaintiff or other person.

113 Fourth. That there has been no evidence introduced in this cause to show whether at the time of the attempting location by the plaintiff of the Lulu and Agnes Mining Claims the ground covered thereby was public domain, except such evidence as relates solely to the defendant's claim thereto.

Fifth. That there has been no evidence introduced in this case to show whether or not the defendant had resumed labor upon its Aluminum and Hortense Mining claims respectively, before the plaintiff made, or attempted to make, locations of said Lulu and Agnes Mining Claims.

Sixth. That on the 2nd day of August, 1905, the defendant filed in the Land Office at Las Cruces, New Mexico, its application for a patent for a group of mining claims, including such Hortense and Aluminum claims, and accompanied the same with the proofs usually required with reference thereto, except that the affidavit of posting the claim with notice of application for patent, had been sworn to before a Notary Public in the County of El Paso, State of Texas, and not within the Land District in which such claims were situated, as required by law. That upon the filing of such application the Register and Receiver caused publication to be made of the pendency of such application and on the 23 day of Oct., 1905, no adverse claim having been filed by any other person, the said Register and Receiver accepted payment in full from the said defendant at the rate required by law for the purchase from the United States of placer mining claims, and thereupon issued to the said defendant the final receipt for the money so paid, and the entry of such lands in the name and for the benefit of the said defendant was thereupon placed upon the records of such receiver and Register as having been duly perfected and made.

114 Seventh. That on or about the — day of May, 1906, and while such final receipt so previously issued to defendant was outstanding and uncanceled, and while the entry of such Aluminum and Hortense mining claims previously made, or attempted

to be made by the defendant, was uncanceled, of record, the plaintiff entered into and upon such Hortense and Aluminum placer claims and thereupon erected other monuments and placed location notices thereupon, respectively, for three additional mining claims known as the Lynch, the Tip Top and the Aurora Claims, and also placed amendatory location notices upon the Lulu and Agnes Claims previously located by him, and that such plaintiff then caused such original and amendatory location notices to be duly recorded in the office of the Probate Clerk and Ex-Officio Recorder of Dona Ana County, New Mexico; but that at the time when such original location notices of the Tip Top, Aurora and Lynch mining claims were made, and at the time when such amendatory location notices of said Lulu and Agnes mining claims were made, or attempted to be made, all of the ground embraced therein upon which plaintiff had made any discovery of mineral had been segregated from the public domain by the previous entry thereof made by the defendant, and the same was not then subject to location under the laws of the United States and remained segregated until the cancellation of such final receipt and of such entry in the month of September, 1906.

Eighth. There is no evidence introduced to show whether at the time of the location of said Tip Top, Aurora and Lynch mining claims and the relocation of such Lulu and Agnes mining claims by the plaintiff aforesaid in the year 1906, the defendant had resumed work upon the ground embraced in such claims, or either thereof.

115 Ninth. There is no evidence to show whether at the time of the location of the Tip Top, Aurora and Lynch, and the Amendatory location of the Lulu and Agnes claims in 1906, the ground embraced therein, or either thereof, was public domain, except such evidence as relates to the same or portions thereof being claimed by the defendant and the plaintiff, respectively.

Tenth. That on the — day of September, 1908, and subsequent to the decision of the Secretary of the Interior cancelling such final receipt and entry of such Hortense and Aluminum placer mining claims, and the waiver of defendant of any right to move for review of such decision, the defendant made amendatory locations in accordance with law of substantially the same ground embraced in such Hortense and Aluminum mining claims and embracing all of the ground contained within the Lynch, Tip Top, Aurora, Lulu and Agnes mining claims claimed by plaintiff upon which mineral had ever been discovered by plaintiff previous to location and amendatory location thereof.

Eleventh. That the original notice of location of the Lulu and Agnes mining claims made by plaintiff in the year 1905 did not comply with the laws of the United States and of the Territory of New Mexico, in that the same did not contain reference to any natural object or permanent monument, as is required by law, and were therefore void.

Twelfth. That the location notices of the Lynch, Tip Top and Aurora, and the amendatory location notices of the Lulu and Agnes

mining claims made by the plaintiff in the year 1906 were not in compliance with the law, in that the same were not made with reference to any natural object or permanent monument, and were therefore void.

Thirteenth. That even in event the original and amendatory locations of the Lulu and Agnes vested in the plaintiff the right and the possession of the ground embraced therein, yet the evidence shows that the plaintiff failed to do the annual amount of labor required upon each of such claims for the year 1907 and the defendant had the lawful right to and did forfeit the rights of the plaintiff to the ground embraced in such claim by the amendatory locations of the Aluminum and Hortense mining claims made by the defendant in September 1908.

Fourteenth. That even in event the original locations of the Tip Top, Aurora and Lynch vested in the plaintiff the right to the possession of the ground embraced therein, yet the evidence shows that the plaintiff failed to do the annual amount of labor required upon each of said claims for the year 1907 and the defendant had the lawful right to and did forfeit the rights of the plaintiff to the ground embraced in such claims by the amendatory locations of the Aluminum and Hortense mining claims made by the defendant in September 1908.

Fifteenth. The original description of the Lulu mining claim contained in the location notice of the same departed from the ground contained therein as marked *is* monumented, to such an extent that such location notice did not contain such an accurate description thereof as required by law.

Sixteenth. The original description of the Agnes mining claim made by the plaintiff contained in the location notice thereof departed from the true description of the ground as marked and monumented, to such an extent that such location notice did not contain such *and* accurate description thereof as required by law.

117

Conclusions of Law.

The Court finds under the facts above determined that the defendant is entitled to the possession of all of the premises adversely claimed by the plaintiff in the complaint filed herein, and that the defendant is not guilty as alleged in such complaint.

HAWKINS & FRANKLIN.

Att's for Def't.

Which said special findings requested by defendant are endorsed upon the back in words and figures following, to-wit:

No. 2849 John H. McKnight, v. El Paso Brick Company. Special findings requested by defendant. Third Judicial District Court, County of Dona Ana. Filed in my office this 17th day of December, 1910. Jose R. Lucero, Clerk. Hawkins & Franklin, El Paso, Texas, Attorneys for Defendant.

And afterwards, to-wit: on the 17th day of December, A. D. 1910, there was filed by the Clerk special findings requested by plaintiff, which are in words and figures following, to-wit:

118 In the District Court of the Third Judicial District of the Territory of New Mexico for Dona Ana County.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendant.

The issues hereon having come on for trial in the County Court House in the town of Las Cruces, on the 8th day of November, 1909, before the Court sitting without a jury, and the parties having submitted oral and documentary testimony in support of the allegations of their respective pleadings, and the testimony having been closed, and the cause having been continued until the 13th day of December for argument and argument having been had, now, after due deliberation, the Court does find the following facts and conclusions of law.

Facts.

I.

On the 5th day of December, 1900, E. Hewit Rodgers, Edward Rodgers, Eb. Rodgers, W. F. Robinson, B. Leibman, H. G. Ross, W. J. Harris and James H. White did locate upon the unsurveyed public domain, in the County of Dona Ana, Territory of New Mexico, a certain placer mining claim, containing about 160 acres; that the said claim was named the "Aluminum" placer claim; and that the said persons did discover valuable mineral deposits within the boundaries thereof and performed all the various acts and things required by the laws of the United States and the Territory of New Mexico, and the legal rules and customs of miners applicable to the location upon the public domain of the United States of placer mining claims, and did on the 10th day of January, 1901,
119 cause the notice of location of said claim to be recorded in the office of the Recorder of the County of Dona Anna.

II.

That on or about the 31st day of March, 1902, E. Hewit Rodgers, Edward Rodgers, A. F. Rodgers, Eb. Rodgers, E. S. Lemen, H. G. Ross, W. F. Robinson and James H. White did locate upon the unsurveyed public domain in the county of Dona Ana, Territory of New Mexico, a certain placer mining claim, containing about 160 acres; that the said claim was named the "Hortense" placer claim; and that the said persons did discover valuable mineral deposits within the boundaries thereof, and did and performed all the various acts and things required by the laws of the United States

and the territory of New Mexico, and the legal rules and customs of miners applicable to the location upon the public domain of the United States of placer mining claims, and did on the 30th day of April, 1902, cause the notice of location of said claim to be recorded in the office of the Recorder of the County of Dona Ana.

III.

That the defendant is a corporation organized under the laws of the State of Texas, and prior to the 5th day of December, 1900, by itself, or its predecessors in interest was in the possession and control of a certain placer mining claim, named the "International," which adjoined and was contiguous to the territory embraced in the said Hortense and Aluminum claims; that there existed upon the said International claim a large deposit of red shale; and that the defendant prior to the said last mentioned date, had constructed a plant for the manufacture of brick out of the said red shale and was engaged in the manufacture thereof out of the red shale in the said International claim.

120

IV.

That the defendant in working the said International claim and in its operation in the manufacture of brick as aforesaid, realized that it might need more shale than existed upon the said International claim and that an opposition plant for the manufacture of brick out of red shale might be established and with a view of shutting out competition and securing additional red shale for said purposes of manufacturing brick, the defendants procured the locators of the Aluminum and Hortense claims to locate the said claims respectively, in behalf, and for the benefit of defendant; and that each of the said two claims was located by the respective locators thereof, not for the benefit of the said locators, or any of them, but entirely for the benefit of the defendant, and with the purpose and intent to enable the defendant to appropriate and hold for its own use and benefit more of the public domain than it would have been permitted to locate and appropriate under the laws of the United States.

V.

That after the location of the said two claims, the respective locators thereof, conveyed the same by divers mesne conveyances to the defendant, without receiving any consideration therefor.

VI.

That neither the locators of the said Hortense and Aluminum claims, or either of said claims, or any of the said locators, or the said defendant, or its predecessors in interest at any time after the location of either of said claims and prior to the 9th day of September, 1908, did not perform, or cause to be done or performed, any work, or made or caused to be made any improvements upon either of the said claims.

That on or about the 1st day of April, 1905, the plaintiff being then a citizen of the United States, located upon the public domain of the United States, open to mineral entry and upon the territory embraced within the said Hortense and Aluminum claims, two certain placer mining claims named respectively, the "Lulu" and the "Agnes"; and that the plaintiff, prior to said location, did discover upon each of the said two claims valuable mineral deposits; and that the plaintiff did each and every act required to be done and performed by the laws of the United States, the Territory of New Mexico, and the rules and regulations prevailing in the said district applicable to the location of placer mining claims, and did, on the 11th day of April, 1905, cause to be recorded in the office of the County Recorder of Dona Ana County a certificate of the notice of location of each of the said placer mining claims, which said notice of location were in the words and figures following, to-wit:

"Lulu" placer mining claim.

Notice is hereby given to all whom it may concern, that I, J. H. McKnight, a citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico; said land and claim lies and is situated in — Mining District, in the County of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stone situated on the north line of the Southern Pacific Railroad about one hundred feet north of said railroad's yard limit post running thence easterly along north line of said railroad Thirteen hundred twenty feet (1320)
 122 to a monument stone, thence northerly six hundred sixty feet (660) to a monument of stone, thence westerly parallel with south line thirteen hundred twenty feet to a monument of stone and place of beginning.

Said land and claim to be known as the Lulu Placer Mining Claim.

Date- on the ground this 7th day of April, 1905.

J. H. MCKNIGHT, *Locator*.

Witness:

T. L. MYERS.

"Agnes" Placer Mining Claim.

Notice is hereby given, To all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one years, have located and by these presents do locate twenty acres of placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claims lies and is situated in —.

Beginning at the S. W. corner of claim identical with the S. W. corner of lot No. 3 Section 9 Tp. 29 S. R. 4 east—A monument of stones, where notice is posted, whence the S. W. corner of the orig-

inal location bears S. 6 deg. West 5.00 chains distant. Thence East on the south boundary of Sec. 9 20.00 chains to the N. E. corner of the S. W. quarter of S. E. quarter of Sec. 9 to the S. E. corner of claim monument of stone. Thence north to right bank of Rio Grande a "stake." Thence with meander of Rio Grande north westerly to intersection with the south boundary of N. half of fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 the N. E. corner of a claim post. Thence westerly along the south boundary of N. half of S. E. quarter Sec. 9 17.28-100 chains to the west boundary of lot No. 3 Sec. 9 of the N. W. corner of claim, 123 monument of stones; whence the N. W. corner of original claim bears N. 36 deg. west 8.70 chains distant. Thence south 10.00 chains to the place of beginning, containing 18½ acres, more or less, being that part of lot No. 3 Sec. 9 corresponding to fractional S. half of the N. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east.

VIII.

That at the time of the location of the said "Lulu" and "Agnes" claims there was only one Southern Pacific Railroad yard limit post in the County of Dona Ana, New Mexico, and that the said yard limit post was in the vicinity of the said claims, and that the description of the said claims in the said notices of location was sufficiently definite to enable anyone to identify the said claims upon the ground.

IX.

That thereafter, and on the 2nd day of August, 1905, the defendant made application to the Land Office in the town of Las Cruces for patent for certain placer mining claims described as the "Aluminum group," and consisting of the said International placer mining claim, and the Hortense and Aluminum placer claims, which application was based upon, and conformed in shape, so far as the said Hortense and Aluminum claims were concerned, to the original location notices of the said claims; and that the defendant accompanied said application with various proofs necessary to be considered by the Land Office, with reference to such application; that the said application for patent was verified by but one person, to-wit, the attorney-in-fact for the defendant; that the proof of posting the notice of defendant's intention to apply for patent, together with a copy of the plat, consisted of the affidavit of two persons which said affidavit was executed before a Notary Public in the 124 State of Texas; that subsequent to the filing of such application for patent, publication of notice thereof was made, and subsequent thereto payment was made by the defendant to the proper official of the Land Office, of the amount required by the United States in the purchase of the two claims, according to the acreage involved in the claims; and that on the 23rd day of October, 1905, the Receiver of the Land Office issued to the defendant a final receipt for the amount of such payment due for such claims and so paid.

That subsequent to the issuance of such receipt, the entry cov-

ered thereby, was, upon due notice to the defendant, considered by the Commissioner of the Land Office upon his own initiative, and upon various tests presented against the allowance of the same, and said Comm. on the Fourth day of September, 1906, upon full hearing, rendered his decision, cancelling such entry.

That thereupon an appeal by the defendant from the decision of the Commissioner was taken to the Honorable, The Secretary of the Interior, who, after considering such appeal, did on the ninth of September, 1908, render his decision, cancelling such entry.

That the decision of the said Secretary of the Interior, was in words and figures following, to-wit:

Department of the Interior, Washington.

LLB.
36-218.
D-320.

E. B. C.

SEP. 9, 1908.

Appeal, Las Cruces M. E.

Ex Parte EL PASO BRICK Co.

No. 719. "N."

125 The Commissioner of the General Land Office.

SIR: The El Paso Brick Company, a corporation, has appealed from your office decision of September 4, 1906, which held for cancellation the company's entry, No. 719, made October 23, 1905, for the International, Aluminum and Hortense placer mining claims, constituting the Aluminum placer group, survey No. 1162, Las Cruces, New Mexico, land district, for the reason that the affidavit of posting of the plat and notice on the land was subscribed and sworn to before a notary public in and for the County of El Paso, State of Texas, and not before an officer authorized to administer oaths within the land district where the claims are situated, as required by section 2335 of the Revised Statutes.

August 2, 1905, the company filed, with other documents its application for patent, duly verified on the preceding day before the Register of the local office by its authorized attorney in fact, wherein, among other things, he avers—

That he posted in a conspicuous place on said lands his notice of intention to apply for patent, together with a copy of aforesaid plat on the 10th day of June, 1904, which said notice and plat is now so posted on said lands, and that a copy of said notice, together with the proof of posting same attached thereto, is filed herewith.

The proof of posting referred to consists of the affidavit of two persons, as having been present on June 10, 1904, when the plat and notice were posted upon the claims in a conspicuous place, which is described with definiteness and particularity, but such affidavit was executed before a notary public in the State of Texas, as above
126 stated.

The plat and notice remained posted until October 20, 1905, publication began August 11, 1905, and was continued for the

full period of sixty days concurrently with posting upon the land and in the local office.

By decision of April 10, 1906, your office found the entry to be defective in the following particulars, namely; that no sworn statement as to fees and charges had been filed; that no evidence as to whether the claims contained known veins or lode was furnished; that the affidavits as to posting and continuous posting were not executed within the land district, that the Hortense claim appeared to contain an excess in area; that full title to the Aluminum claim was not shown to be in the company; that the requisite improvements were not shown; that the mineral character of the land did not satisfactorily appear; that the Aluminum and Hortense claims were irregular in shape and no sufficient reason was shown for the failure to conform to them as near as practicable with the United States system of public land surveys. The company was granted sixty days in which to show cause why the entry should not be canceled. In response numerous affidavits and exhibits, designed to overcome the above objections, were filed on behalf of the company, and among them, certain affidavits executed before a Notary Public within the land district, showing the fact of the seasonable posting on the land.

September 4, 1906, your office considered the showing submitted, and stated that it appeared to be necessary to discuss but one feature of the case in order to show that the entry was fatally defective, namely, the original affidavit as to posting. Finding that the affidavit was not executed as required by the statute, and citing as authorities the cases of *Mattes v. Treasury, etc. Co.*, (34 L. D. 314) 127 and *Frazier Borate Mining Co. v. Calm* (departmental decision of March 17, 1905, unreported) your office concluded that the entry must be held for cancellation.

The pending appeal followed.

The appellant company has assigned a number of specifications of error. Additional affidavits and exhibits have been filed by the company for the purpose of sustaining the entry, and exhaustive printed briefs and arguments had been submitted by counsel.

Certain persons asserting claims to portions of the land have filed protests against the entry, and on their behalf there have been presented extensive arguments and counter-affidavits designed to support the decisions of your office. Up to the present time, however, the case has been an *ex parte* proceeding.

It is not necessary, and would serve no useful purpose at this time, to enter into details as to the discussion presented by the respective counsel, which covers a wide range. Suffice it to state that the appellant company earnestly contends, in effect, that the defect as to the affidavit of posting upon the claims is not fatal to the entry under the circumstances of this case and does not go to the jurisdiction of the land department to entertain the present patent proceedings. In other words, it is argued that the provision of the statute, as to the filing of the affidavit of two witnesses showing posting upon the land, is not mandatory but directory; that the jurisdiction of the local officers attaches by virtue of the fact of posting, which is

not questioned here, and not by reason of the filing of the proof of such fact is the precise form directed by the statute, provided the fact of posting clearly appears otherwise, as it is claimed that it did in this case by the allegations contained in the patent application.

The following provisions of the Revised Statutes are pertinent to this case:

SEC. 2325. * * * Any person, association, or corporation * * * who has, or have complied with the terms of this chapter for a patent, under oath showing such compliance, together with a plat and field notes of the claim or claims in common * * * and shall post a copy of such plat, together with a notice of such application for patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The Register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office * * *

With the contention of the Company the Department is unable to agree. The allegations of the application are verified by but one person, while the statute requires "an affidavit of at least two persons." Section 2323, *supra*. And the Department has heretofore held that these particular provisions of the statute are mandatory. In the case of Mojave Mining and Milling Co. v. Karma Mining Co. (34 L. D., 583-6) in which the affidavit of posting contained no statement that the plat of the claim was posted or in any manner mentioned or referred to it, the following language was referred to it, the following language was used:

The statutory requirement that the fact of posting shall be shown by an affidavit of at least two persons is mandatory, and one against which the land department is without authority to grant relief. Until such affidavit is filed the register is without authority to proceed upon the application, and should not attempt to do so in any case. As the required affidavit was not filed in this case the proceedings upon the application for patent were without authority of law. In this particular the terms of the statute were not complied with and there is therefore no assumption that the applicant company is entitled to a patent and that no adverse claim exists. Such being the state of the record, the patent proceedings must fall, and it is not

material to inquire whether the plat and notice were in fact posted as required or not.

The entry will be cancelled, but without prejudice to the renewal of patent proceedings should the applicant company so desire.

In the case of Frazier Borate Mining Co. v. Calm (unreported departmental decision of June 15, 1905, on review) where the question involved was the verification of an application for patent and an affidavit of posting, in each case outside of the land district, the Department held as follows, the quotation also appearing in the case of Milford Metal Mines Investment Co. (45 L. D. 174, 175);

Neither section 2335 of the Revised Statutes, nor any other provision of the mining laws, authorize the verification of applications for patent or affidavits such as here involved otherwise than before an officer authorized to administer oaths within the land district where the claim is situated. The attempted verification of the application and affidavit in question before an officer acting without authority under the law, was of no more legal effect than if no attempt at verification had been made; and the notice published by the register based upon such application and affidavit, being without legal foundation, was fatally defective. The case was therefore not one of mere irregularity, or one which presented defects that might be cured by supplemental proceedings. The notice being invalid, the entry cannot stand. (Southern Cross Gold Mining Company v. Section et al., 31 L. D. 415).

Having under consideration the verification of an adverse claim, the Department, in the case of Mattes v. Treasury, etc. Co. on review (34 L. D. 31-4) held as follows (Syllabus):

All affidavits under the mining laws are required to be verified in accordance with the provisions of section 2335 of the Revised Statutes, except where authority for their execution is otherwise specifically given by statute.

The foregoing views of the Department as in harmony with, and are re-inforced by, other cases in which a similar principle has been invoked. In the case of Rico Lode (8 L. D., 223) the entry was held to be invalid because the applications, as well as all others papers except the proof of continuous posting, was verified by the attorney in fact, while the applicants themselves were residents of, and were within the land district at the time, the application was made. In the case of Crosby and Other Lode Claims (35 L. D. 434) the application for patent was held to be a nullity because verified by an agent, the applicants being residents of the land district, and if not being shown that at the time the application was made they were in fact not within the same; and a request that the case be submitted for equitable consideration and action under sections 2450 and 2457, inclusive, of the Revised Statutes, was denied. The application for the patent in the case of the North Clyde Quartz Mining Claim and the Millsite (35 L. D., 455), was held to be bad because verified outside of the land district. In each of these cases the proceedings were held to be invalid and the entry ordered cancelled.

In view of the foregoing it must be held that the affidavit of post-

ing here in question is fatally defective. The defect is not a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essential to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been theretofore filed, the Register was without authority to direct the publication of the notice or otherwise proceed and the notice, although in fact published and posted, being without the necessary legal basis, as a nullity and ineffectual for any purpose. The patent proceedings therefore fall and the entry will be cancelled.

The appellant company puts forward a further and alternative contention to the effect that, even though the entry should be
132 considered defective, yet it should be submitted for equitable consideration under said sections 2450 and 2457 of the Revised Statutes. This disposition cannot be made of the case, for the reason that the record shows that there are alleged adverse claims, and for the further reason that, as was held in the case of Crosby and Other Lode Claims, *supra*, there has been no substantial compliance with the law, the entry and the proceedings upon which it is based being wholly invalid.

In as much as the conclusion reached above effectually disposes of the present entry, it is unnecessary to discuss the other questions raised by counsel in the argument.

It should be pointed out, however, that from the record before the Department, it appears that three homestead entries (Nos. 4723, 4724 and 4931, Las Cruces series) were inadvertently allowed of record in the year following the making of the mineral entry, each one in part in conflict therewith. One of these entries (No. 4724) was a second homestead filing and was allowed by the local officers in the absence of the authorization of your office and of the necessary showing required in cases of second entries. Also against this entry two corroborated protests have been filed, changing the mineral character of portions of the land covered thereby. In this connection attention is directed to the allegations of the numerous affidavits filed on behalf of the company tending to establish the mineral character of the land embraced within its three placer mining claims. These matters should receive due consideration and your office will take such action and give such instructions to the local officers as the premises may warrant.

The decision appealed from is accordingly affirmed and the papers are herewith returned.

Very respectfully,
(Signed)

FRANK PIERCE,
First Assistant Secretary.

133 That thereafter and on the 24th day of Nov. 1908 the defendant waived before the Honorable Secretary its right to make a review of such decision, and thereupon such decision and the cancellation of said entry became final, and said entry was cancelled on the records of the land office. That afterwards and while the proceedings were pending before the Commissioner of the General

Land Office, and on the — day of — 1907, the defendant caused to be made a supplementary affidavit with reference to such posting and such claim, which said affidavit was in compliance with the laws of the United States and was verified before a proper officer in the county of Dona Ana, Territory of New Mexico.

X.

That on the — day of May, 1906, the plaintiff being then a citizen of the United States, and the owner of the said Lulu and Agnes claims located as aforesaid, did relocate the said territory embraced within the said Lulu and Agnes claims, and did locate other territory adjacent and contiguous thereto, which said territory so relocated and located was covered by five placer mining claims, so located by plaintiff, named respectively, the "Lulu," the "Agnes," the "Lynch," the "Tip Top," and the "Aurora," which said five certain claims are described as follows, respectively:

The "Agnes" claim described as follows:

Beginning at the S. W. corner of claim identical with the S. W. corner of lot No. 3 Section 9 Tp. 29 S. R. 4 east—A monument of stones, where notice is posted, whence the S. W. corner of the original location bears S. 6 deg. West 5.00 chains distant. Thence East on the south boundary of Sec. 9 20.00 chains to the N. E. corner of the S. W. quarter of S. E. quarter of Sec. 9 the S. E. corner of claim monument of stone. Thence north to right bank of Rio Grande a "stake." Thence with meander of Rio Grande north westerly to intersection with the south boundary of N. half of fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 the N. E. corner of a claim post. Thence westerly along south boundary of N. half of S. E. quarter Sec. 9 17.28-100 chains to the west boundary of lot No. 3 Sec. 9 of the N. W. corner of claim monument of stones; whence the N. W. corner of original claim bears N. 36 deg. west 8.70 chains distant. Thence south 10.00 chains to the place of beginning, containing 18½ acres, more or less, being that part of lot No. 3 Sec. 9 corresponding to fractional S. half of the N. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east.

The "Lulu" claim described as follows:

Beginning at the north west corner of the N. E. quarter of N. E. quarter of S. W. quarter of Section 9 Tp. 29 S. R. 4 east N. M. P. M. a monument of stone. Thence east 18 25.100 chains, to right bank of Rio Grande a post, the N. E. corner. Thence S. E. ly with meander of Rio Grande to North intersection of dividing line bet. the E. and W. half of the N. W. quarter of the S. E. quarter of Sec. 9—a post. Thence south along said dividing line bet. east and west halves of the N. W. quarter of the S. E. quarter of Sec. 9 to S. E. corner of claim—a monument of stones. Thence west along south boundary of N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 10.00 chs. Thence W. along S. boundary of N. E. quarter N. E. quarter S. W. quarter Sec. 9 10 chs. to S. W. cor. of claim a monument of stones. Thence north along west boundary of N. E. quarter of N. E. quarter of Sec. 9 10.00 chs. to place of beginning. Comprising the N. E. quarter of the S. W. quarter and that portion of lot 3 being fractional N. W. quarter of N. W. quarter

of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east, containing 19-12-100 acres more or less. This notice is posted at N. W. corner of claim, whence the S. W. corner of the original location bears S. 40 deg. E. 60 lks. distant, and N. W. cor. of original location bears N. 2 deg. west 10.20 chains distant.

The "Lynch" claim described as follows:

Beginning at quarter section corner between sections 9 and 16 Tp. 29 S. R. 4 east, the south west corner of claim, monument of stones. Thence north 20.00 chs. to N. W. cor. identical with N. W. corner of lot No. 4, monument of stones. Thence east on north boundary of lot No. 4—10.00 chs. to N. E. cor. monument of stones. Thence south 20.00 chs. to line bet. sections 9 and 16 the south east corner, a monument of stones where this notice is posted. Thence west along Section line 10.00 chs. to southwest corner, the place of beginning, being that portion of lot No. 4 corresponding to the W. half of the S. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east. Containing 20 acres.

The "Tip Top" claim described as follows:

Beginning at a monument of stones the S. E. cor. of claim identical with the N. E. cor. of N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 S. R. 4 east. Thence north 20.00 chs. to the N. E. corner, a monument of stones, identical with the N. E. cor. of that portion of lot No. 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9. Thence west 10.00 chs. to the N. W. cor. of claim, a monument of stone. Thence south 20.00 chs. to the S. W. cor. of claim, a monument of stones, where this notice is posted. Thence east along section line between 9 and 16, 10.00 chs. to place of beginning, containing 20 acres being that portion of Lot No. 4 of Sec. 9 Tp. 29 S. R. 4 east corresponding to east half of S. W. quarter of Sec. 9 Tp. 29 S. Range 4 east.

The "Aurora" claim described as follows:

Beginning at the N. E. corner of the N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 South R. 4 East, being the S. W. corner of claim, monument of stone, where this notice is posted. Thence north 20.00 chs. to north boundary of lot No. 4 Sec. 9 the N. W. corner of claim monument of stone. Thence East 15.00 chs. to right bank of Rio Grande, North East corner of claim a post. Thence Southerly with meander of right bank of Rio Grande -long east boundary of lot No. 4 Sec. 9 to meander corner on right bank of Rio Grande bet. Sections 9 and 16, the South East corner a Post. Thence west along Section line 11 25-100 chs. to the S. W. Corner place of beginning. Containing 18 60-100 acres, being that portion of lot No. 4 lying bet. the East boundary of that portion of lot 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 East and the Rio Grande.

That in locating each of the five claims, the plaintiff did and performed each and every act required to be done and performed by the laws of the United States, the Territory of New Mexico, and the rules and regulations prevailing in said district, applicable to the location of placer mining claims, and that the plaintiff before making said locations, did discover valuable mineral deposits upon each of the said five claims, and did cause a notice of location of each of them

to be recorded in the — day of May, 1906, in the office of the Recorder of the county of Dona Ana.

XI.

137 That the plaintiff, did during the year 1906, cause to be performed upon each of the said Lulu and Agnes claims, work and improvements of the value of One hundred Dollars, and that in the year 1907, the plaintiff did cause to be performed upon or for the improvement and development of each of the said five claims, to-wit, the Lulu, the Agnes, the Lynch, the Tip-Top, and the Aurora work and improvements of the value of one hundred dollars each; and in the year 1908, the plaintiff did cause to be performed upon or for the improvement and development of each of the said five claims, to-wit, the Lulu, the Agnes, the Lynch, the Tip-Top, and the Aurora work and improvements of the value of One hundred dollars each.

XII.

That on or about the first day of September, 1908, the plaintiff resumed assessment work upon the said five claims, the Lulu, the Agnes, the Lynch, the Tip Top, and the Aurora for the year 1908, and continued to do said assessment work upon or for the benefit and improvement of the said claims until the defendant undertook to relocate the said Hortense and Aluminum claims, as hereinafter found, and that the plaintiff was actually doing said work upon or for the benefit of improvement of the said claims at the time when the defendant so undertook to relocate the said claims.

That on or about the 11th day of September, 1908, the defendant relocated the territory embraced within the said Hortense and Aluminum claims, the said territory being then a part of the territory covered by the said five claims so located as aforesaid by the plaintiff, and did do and perform each and every act required by the laws of the United States the Territory of New Mexico, and the rules and regulations of miners in said district with respect to the
138 location to be filed on the — day of —, 1908 in the office of the Recorder of the county of Dona Ana, copies of said notices of location being attached to defendant's answer herein.

XIV.

That on or about the 25th day of November, 1908, the defendant filed in the United States Land Office at Las Cruces, New Mexico, an application for United States Mineral Patent for the Aluminum group of placer mining claims, so-called, consisting of the International and the said Hortense and Aluminum placer claims as relocated on the 11th day of September, 1906, as hereinbefore found and caused the register of the said Land Office to give notice of said application for patent by publication as required by law; that in and by said application for patent, the defendant set up and alleged that he was the owner and in possession of the said group of placer mining claims, which included the tracts of land and premises covered by the said Lulu, Agnes, Lynch, Tip Top and Aurora claims, and hereinbefore in finding No. X described.

XV.

That the plaintiff on or about the 30th day of December, 1908, filed in the said office, under oath, a protest and adverse claim against said application of defendant, and for said premises in said finding No. X described, in due form, and showing the nature, extent and boundaries of the adverse claim of the plaintiff, and that thereupon further proceedings of said application in said land office were stayed to await the determination of a court of competent jurisdiction, of the right of possession of the said premises in finding No. X described, and the rights of the respective parties therein and thereto; and that to that end, the plaintiff within thirty days after the filing of said protest and adverse claim, did bring and institute this suit.

139

Conclusions of Law.

I.

That the location of the Hortense and Aluminum claims were made by the respective locators thereof, and were procured to be made by the defendant, not in good faith and with the intent and purpose to defraud the United States, and were and are fraudulent and void.

II.

That the application of the defendant for patent on the 2nd of August, 1905, and the paper purporting to be a final receipt issued and given to the defendant by the Receiver of the Land Office at Las Cruces, were, from their inception, void a nullity and of no effect.

III.

That the location by the plaintiff of the Lulu and Agnes placer mining claims, made in April, 1905, and the relocation and locations of the Lulu, Agnes, Lynch, and Tip Top claims made by the plaintiff in May, 1906, were upon unappropriated public domain of the United States, and were made in conformity with the laws of the United States and with the Territory of New Mexico, and with the rules and regulations of miners in said district, and that by reason of said locations and the assessment work by the plaintiff upon said claims, the plaintiff at the time of said locations, became, and now is entitled to the possession of the territory covered by the said locations, and in finding X described.

IV.

That the plaintiff is entitled to judgment against the defendant accordingly.

Which said special findings requested by plaintiff, are entered upon the back in the words and figures as follows, to-wit:

No. 2849. John H. McKnight vs. El Paso Brick Co. Special Findings Requested by Plaintiff. Third Judicial District Court, County of Dona Ana. Filed in my office this 17th day of December, 1910. Jose R. Lucero, Clerk.

And afterwards, to-wit: on the 17th day of December, A. D. 1910, there was filed with the clerk Findings of Fact, Conclusions of Law and Judgment and ordered placed of record five days after the filing thereof, which said Findings of Fact, Conclusions of Law and Judgment are in the words and figures following, to-wit:

In the Third Judicial Court of the Territory of New Mexico, Sitting within and for the County of Dona Ana.

Civil. No. 2849.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendant.

Order.

The issues herein having come on for trial in the County Court House in the town of Las Cruces, on the 8th day of November, 1909, before the court sitting without a jury and the parties having submitted oral and documentary testimony in support of the allegations of their respective pleadings, and the testimony having been closed, and the cause having been continued on the 13th day of December for Argument and argument having been had, now, after due deliberation, the court does find the following facts and conclusions of law:

Facts.

I.

On the 15th day of December 1900, E. Hewitt Rodgers, Edward Rodgers Eb. Rodgers, W. F. Robinson, B. Leibman, H. B. Ross, W. J. Harris and James H. White did locate upon the unsurveyed public domain, in the County of Dona Ana, Territory of New Mexico, a certain placer mining claim, containing about 160 acres; that the said claims was named the "Alumimum" placer claim; and that the said persons did discover valuable mineral deposits within the boundaries thereof and did and performed all the various acts and things required by the laws of the United States and the Territory of New Mexico, and the legal rules and customs of miners applicable to the location upon the public domain of the United States

of placer mining claims, and they did on the 10th day of January, 1911, cause the notice of location of said claims to be recorded in the office of the Recorder of the County of Dona Ana.

II.

That on or about the 31st day of March, 1902, E. Hewitt Rodgers, Edward Rodgers, A. F. Rodgers, Eb. Rodgers, E. S. Lemen, H. G. Ross, W. F. Robinson and James H. White did locate upon the unsurveyed public domain in the County of Dona Ana, Territory of New Mexico, a certain placer mining claim, containing about 160 acres; that the said claim was named the "Hortense" placer claim, and that the said persons did discover valuable mineral deposits within the boundaries thereof, and did and performed all the various acts and things required by the laws of the United States and the Territory of New Mexico, and legal rules and customs of miners applicable to the location upon the public domain of the United States of placer mining claims, and did on the 30th day of April, 1902, cause the notice of location of said claims to be recorded in the office of the Recorder of the County of Dona Ana.

III.

That the defendant is a corporation organized under the laws of the state of Texas, and prior to the 5th day of December, 1900, by itself or its predecessors in interest, was in the possession and control of a certain placer mining claim, named the "International," which adjoined and was contiguous to the territory embraced in the said Hortense and Aluminum claims; that there existed upon the said International claim a large deposit of red shale; and that the defendant prior to the said last mentioned date, had constructed a plant for the manufacture of brick out of the said red shale and was engaged in the manufacture thereof out of the red shale in the said International claim.

IV.

That after the location of the said two claims, the respective locators thereof, conveyed the same by divers mesne conveyances to the defendant, without receiving any consideration therefor.

V.

That neither the locators of the said Hortense or Aluminum claims, or either of the said claims, or any of the said locators, or the said defendant, or its predecessors in interest, at any time after the location of either of said claims, and prior to the 9th day of September, 1908, did or performed, or cause to be done or performed, any work or made or cause to be made any improvements upon either of the said claims.

VI.

That on or about the first day of April, 1905, the plaintiff being then a citizen of the United States, located upon the public domain

of the United States open to mineral entry, and upon the territory embraced within the said Hortense and Aluminum claims, two certain mining claims, named respectively the "Lulu" and the "Agnes"; and that the plaintiff, prior to said location, did discover upon each of the said two claims valuable mineral deposits; and that the plaintiff did each and every act required to be done and performed by the laws of the United States, the Territory of New Mexico, and the rules and regulations prevailing in the said district applicable to the location of placer mining claims, and did, on the 11th day of April, 1905, cause to be recorded in the office of the County Recorder of Dona Ana County a certificate of the notice of location of each of the said placer mining claims which said notices of location were in the words and figures following, to-wit:

"Lulu" Placer Mining Claim.

Notice is hereby given to all to whom it may concern, that, I, J. H. McKnight, Citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the County of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

144 Beginning at a monument of stones situated on the North line of the Southern Pacific Railroad about one hundred feet north of said railroad yard limit post running thence Easterly along north line of said Railroad, thirteen hundred and twenty (1320) feet to a monument of stone, thence northerly six hundred and sixty feet (660) to a monument of stone, thence westerly parallel with south line Thirteen hundred twenty feet to a monument of stone, thence southerly six hundred sixty feet (660) to a monument of stone and place of beginning.

Said land and claim to be known as the Lulu Placer Mining Claim.

Date- on the ground this 7th day of April, 1905.

J. H. McKNIGHT, *Locator*.

Witness:

T. L. MYERS.

"Agnes" Placer Mining Claim.

Notice is hereby given, to all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of Placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the county of Dona Ana, Territory of N. M., and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stone situated on the south line of the Southern Pacific Railroad about two hundred feet easterly of

said Railroad yard limits post, running thence easterly along the south line of said R. R. Six hundred and sixty feet (660) to a monument of stone, thence southeasterly along south line of said R. R. Thirteen hundred and twenty feet (1320) to a monument of stone, thence southwesterly parallel with westerly line, six hundred and sixty feet (660) to a monument of stone, thence northwesterly *six hundred and sixty feet (660) to a monument of stone*, Thirteen hundred and twenty feet (1320) to the place of beginning.

Said land and claim to be known as the Agnes Placer Mining Claim.

Date on the ground this 7th day of April, 1905.

J. H. MCKNIGHT, *Locator*.

Witness:

T. L. MYERS.

"Lulu" Placer Mining Claim.

Notice is hereby given to all to whom it may concern, that, I, J. H. McKnight, Citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the County of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stones situated on the North line of the Southern Pacific Railroad about one hundred feet north of said railroad yard limit post running thence Easterly along north line of said Railroad, thirteen hundred and twenty (1320) feet to a monument of stone, thence northerly six hundred and sixty feet (660) to a monument of stone, thence westerly parallel with south line Thirteen hundred twenty feet to a monument of stone, thence southerly six hundred sixty feet (660) to a monument of stone and place of beginning.

Said land and claim to be known as the Lulu Placer Mining Claim.

Date on ground this 7th day of April, 1905.

J. H. MCKNIGHT, *Locator*.

Witness:

T. L. MYERS.

"Agnes" Placer Mining Claim.

Notice is hereby given, to all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of Placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the county of Dona Ana, Territory of N. M., and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stone situated on the south line of the Southern Pacific Railroad about two hundred feet easterly of said Railroad yard limits post, running thence easterly along the south line of said R. R. Six hundred and sixty feet (660) to a monument of stone, thence southeasterly along south line of said R. R. Thirteen hundred and twenty feet (1320) to a monument of stone, thence southwesterly parallel with westerly line, six hundred and sixty feet (660) to a monument of stone, thence northwesterly *six hundred and sixty feet (660) to a monument of stone*, Thirteen hundred and twenty feet (1320) to the place of beginning.

Said land and claim to be known as the Agnes Placer Mining Claim.

Date- on the ground this 7th day of April, 1905.

J. H. McKNIGHT, *Locator*.

Witness:

T. L. MYERS.

VII.

That at the time of the location of the said "Lulu" and "Agnes" claims there was only one Southern Pacific railroad yard limit post in the County of Dona Ana, New Mexico, and that the said yard limit post was in the vicinity of the said claims, and that the description of the said claims in the said notices of location

147 was sufficiently definite to enable anyone to identify the said claims upon the ground.

VIII.

That thereafter, on the 2nd day of August, 1905, the defendant made application to the Land Office in the town of Las Cruces for patent for certain mining claims described as the "Aluminum group," and consisting of the said International placer mining claim, and the Hortense and Aluminum placer claims, which application was based upon, and conformed in shape, so far as the said Hortense and Aluminum claims were concerned to the original location notices of the said claims; and that the defendant accompanied said application with various proofs necessary to be considered by the Land Office, with reference to such application; that the said application for patent was verified by but one person, to-wit: the attorney-in-fact for the defendant; that the proof — patent, together with a copy of the plat, consisted of the affidavit of two persons which said affidavit was executed before a Notary Public in the State of Texas; that subsequent to the filing of such application for patent, publication of notice thereof was made, and subsequent thereto *and* payment was made by the defendant to the proper official of the Land Office, of the amount required by the United States in the purchase of the two claims, according to the acreage involved in the claims; and that on the 23rd day of October, 1905, the Receiver of the Land Office issued to the defendant a final receipt for the amount of such payment due for such claim and so paid.

That subsequent to the issue of such receipt, the entry covered thereby, was, upon due notice to the defendant, considered by the Commissioner of the Land Office upon his own initiative, 148 and upon various protests presented against the allowance of the same, and said Commissioner, on the Fourth day of September, 1906, upon full hearing, rendered his decision, cancelling such entry.

That thereupon an appeal by the defendant from the decision of the Commissioner was taken to the Honorable, The Secretary of the Interior, who, after considering such appeal, did on the 9th day of September, 1908, render his decision, cancelling such entry.

That the decision of the said Secretary of the Interior, was in the words and figures following, to-wit:

Department of the Interior,
Washington, D. C.

L.L.B.
36-218,
D-320.

E.B.C.

SEP. 9, 1908.

Appeal, Las Cruces M. E.

Ex Parte EL PASO BRICK Co.

No. 719. "N."

The Commissioner of the General Land Office.

Sir: The El Paso Brick Company, a corporation, has appealed from your office decision of September 4, 1906, which held for cancellation the company's entry, No. 719, made October 23, 1905, for the International, Aluminum and Hortense placer mining claims, constituting the Aluminum placer group, survey No. 1162, Las Cruces, New Mexico, land district, for the reason that the affidavit of posting of the plat and notice on the land was subscribed and sworn to before a notary public in and for the County of El

149 Paso, State of Texas, and not before an officer authorized to administer oaths within the land district where the claims are situated, as required by section 2335 of the Revised Statutes.

August 2, 1905, the company filed, with other documents, its application for patent, duly verified on the preceding day before the Register of the local office by its authorized attorney in fact, wherein, among other things, he avers:

That he posted in a conspicuous place on said lands his notice of intention to apply for patent, together with a copy of aforesaid plat on the 10th day of June, 1904, which said notice and plat is now so posted on said lands, and that a copy of said notice, together with the proof of posting same attached thereto, is filed herewith.

The proof of posting referred to consists of the affidavit of two persons, as having been present on June 10, 1904, when the plat and notice were posted upon the claims in a conspicuous place, which is

described with definiteness and particularity, but such affidavit was executed before a notary public in the State of Texas, as above stated.

The plat and notice remained posted until October 20, 1905. Publication began August 11, 1905, and was continued for the full period of sixty days, concurrently with posting upon the land and in the local office.

By decision of April 10, 1906, your office found the entry to be defective in the following particulars, namely, that no sworn statement as to fees and charges had been filed; that no evidence as to whether the claims contained known veins or lode was furnished; that the affidavits as to posting and continuous posting were not

150 executed with the land district; that the Hortense claim appeared to contain an excess in area; that the full title to the

Aluminum claim was not shown to be in the company; that the requisite improvements were not shown; that the mineral character of the land did not satisfactorily appear; and that the Aluminum and Hortense claims were irregular in shape and no sufficient reason was shown for the failure to conform them as near as practicable with the United States system of public land surveys. The company was granted sixty days in which to show cause why the entry should not be cancelled. In response numerous affidavits and exhibits, designed to overcome the above objections, were filed on behalf of the company, and among them, certain affidavits executed before a Notary Public within the land district, showing the fact of the seasonable posting on the land.

September 4, 1906, your office considered the showing submitted, and stated that it appeared to be necessary to discuss but one feature of the case in order to show that the entry was fatally defective, namely, the original affidavit as to posting. Finding that that affidavit was not executed as required by the statute, and citing as authorities the cases of *Mattes v. Treasury, etc., Co.*, (34 L. D. 314) and *Frazier Borate Mining Co. v. Calm* (departmental decision of March 17, 1905, unreported) your office concluded that the entry must be held for cancellation.

The pending appeal followed.

The appellant company has assigned a number of specifications of error. Additional affidavits and exhibits have been filed by the company for the purpose of sustaining the entry, and exhaustive printed briefs and arguments have been submitted by counsel.

Certain persons asserting claims to portions of the land have filed protests against the entry, and on their behalf there have
151 been presented extensive arguments and counter-affidavits designed to support the decisions of your office. Up to the present time, however, the case has been an ex parte proceeding.

It is not necessary and would serve no useful purpose at this time, to enter into details as to the discussion presented by the respective counsel, which covers a wide range. Suffice it to state that the appellant company earnestly contends, in effect, that the defect as to the affidavit of posting upon the claims is not fatal to the entry under the circumstances of this case and does not go to the jurisdiction of the land department to entertain the present patent proceedings. In other words, it is argued that the provision of the

statute, as to the filing of the affidavit of two witnesses showing the posting upon the land, is not mandatory but directory; that the jurisdiction of the local officers attaches by virtue of the fact of posting, which is not questioned here, and not by reason of the filing of the proof of such fact is the precise form directed by the statute, provided the fact of posting clearly appears otherwise, as it is claimed that it did in this case by the allegations contained in the patent application.

The following provisions of the Revised Statutes are pertinent to this case:

SEC. 2325. * * * Any person, association or corporation * * * who has, or have, complied with the terms of this chapter for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common * * * and shall post a copy of such plat, together with a notice of such application for patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been
152 duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application plat, field notes, notices and affidavits, shall publish a notice that such application has been made for the period of sixty days, in a newspaper to be by him designated as published nearest to such claims, and he shall also post such notice in his office for the same period.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office.

With the contention of the company the Department is unable to agree. The allegations of the application are verified by but one person, while the statute required "an affidavit of at least two persons," Section 2325, supra. And the Department has heretofore held these particular provisions of the statute are mandatory. In the case of Mojave Mining and Milling Co. vs. Karma Milling Co. (34 L. D. 583-6) in which the affidavit of posting contained no statement that the plat of the claim was posted or in any manner mentioned or referred to it, the following language was used:

The statutory requirement that the fact of posting shall be shown by an affidavit of at least two persons is mandatory, and one
153 against which the land department is without authority to grant relief. Until such affidavit is filed, the register is without authority to proceed upon the application, and should not attempt to do so in any case. As the required affidavit was not filed in this case, the proceedings upon the application for patent were without authority of law. In this particular the terms of the statute were not complied with and there is therefore no assumption that the applicant company is entitled to a patent and that no advance

claim exists. Such being the state of the record, the patent proceedings must fall, and it is not material to inquire whether the plat and notice were in fact posted as required or not. The entry will be cancelled, but without prejudice to the renewal of patent proceedings should the applicant company so desire.

In case of Frazier Borate Mining Co. vs. Calm (unreported departmental decision of June 15, 1905, on review, where the question involved was the verification of an application for patent and an affidavit of posting, in each case outside of the land district, the Department held as follows, the quotation also appearing in the case of Milford Metal Mines Investment Co. (45 L. D. 174, 175):

Neither section 2335 of the Revised Statutes, nor any other provision of the mining laws, authorizes the verification of applications for patent or affidavits such as here involved otherwise than before and officer authorized to administer oaths within the land district where the claim is situated. The attempted verification of the application and affidavit in question before an officer acting without authority under the law, was of no more legal effect than if
154 no attempt at verification had been made; and the notice published by the register based upon such application and affidavit, being without legal foundation, was fatally defective. The case was therefore not one of mere irregularity, or one which presented defects that might be cured by supplemental proceedings. The notice being invalid, the entry cannot stand. (Southern Cross Gold Mining Company vs. Sexton, et al., 31 L. D. 415.)

Having under consideration the verification of an adverse claim, the department, in the case of Mattes vs. Treasury, etc., Co. on review (34 L. D. 314), held as follows (syllabus):

All affidavits under the mining laws are required to be verified in accordance with the provisions of section 2335 of the Revised Statutes except where authority for their execution is otherwise specifically given by statute.

The foregoing views of the Department are in harmony with, and are re-enforced by, other cases in which a similar principle has been involved. In the case of Rico Lode (S. L. D. 223), the entry was held to be invalid because the application, as well as all other papers except the proof of continuous posting, was verified by the attorney in fact, while the applicants themselves were residents of, and were within, the land district at the time the application was made. In the case of Crosby and other Lode claims (35 L. D. 434) the application for patent was held to be a nullity because verified by an agent, the applicants being residents of the land district, and it not being shown that at the time the application was made they were in fact not within the same; and a request that the case be submitted for equitable consideration and action under sections 2450
155 and 2457 inclusive, of the Revised Statutes, was denied. The application for patent in the case of North Clyde Quartz Mining Claim and Mill-side (35 L. D. 455), was held to be *bad* because verified outside of the land district. In each of these cases the proceedings were held to be invalid and the entry ordered cancelled.

In view of the foregoing it must be held that the affidavit of posting here in question is fatally defective. The defect is not a mere

irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been heretofore filed, the Register was without authority to direct the publication of the notice or otherwise proceed and the notice, although in fact published and posted, being without the necessary legal basis, was a nullity and ineffectual for any purpose. The patent proceedings therefore fall and the entry will be cancelled.

The appellant company puts forward a further and alternative contention to the effect that, even though the entry should be considered defective, yet it should be submitted for equitable consideration under said sections 2450 and 2457 of the Revised Statutes. This disposition cannot be made of the case, for the reason that the record shows that there are alleged adverse claims, and for the further reason that, as was held in the case of Crosby and other Lode claims, *supra*, there has been no substantial compliance with the law, the entry and the proceedings upon which it is based being wholly invalid.

Inasmuch as the conclusion reached above effectually disposed of the present entry, it is unnecessary to discuss the other questions raised by counsel in the argument.

It should be pointed out, however, that from the record, before the department, it appears that three homestead entries (Nos. 4723 and 4931, Las Cruces series) were inadvertently allowed of record in the year following the making of the mineral entry, each one in part in conflict therewith. One of these entries, (No. 4724), was the second homestead filing and was allowed by the local officers in the absence of the authorization of your office and of the necessary showing required in cases of second entries. Also against this entry two corroborated protests have been filed, charging the mineral character of portions of the land covered thereby. In this connection attention is directed to the allegations of the numerous affidavits filed on behalf of the company tending to establish the mineral character of the land embraced within its three placer mining claims. These matters should receive due consideration and your office will take such action and give such instructions to the local officers as the premises may warrant.

The decision appealed from is accordingly affirmed and the papers are herewith returned.

Very respectfully,
(Signed)

FRANK PIERCE,
First Assistant Secretary.

That thereafter and on the 24th day of November, 1908, the defendant waived before the *Homestead* Secretary its right to make a review of such decision, and thereupon such decision and the cancellation of said entry became final, and said entry was cancelled on the records of the land office. That afterwards and while the said

proceedings were pending before the commissioner of the
 157 General Land Office, and on the — day of —, 1907, the
 defendant caused to be made a supplementary affidavit with
 reference to such posting and such claim which said affidavit was
 in compliance with the laws of the United States and was verified
 before a proper officer in the County of Dona Ana, Territory of New
 Mexico.

IX.

That on the — day of May, 1906, the plaintiff being then a citizen of the United States, and the owner of the said Lulu and Agnes claims, located as aforesaid, did re-locate the said territory embraced within the said Lulu and Agnes claims, and did locate other territory adjacent and contiguous thereto, which said territory so re-located and located, was covered by five placer mining claims, so located by the plaintiff, named respectively, the "Lulu," the "Agnes," the "Lynch," the "Tip Top" and the "Aurora," which said five certain claims are described respectively:

The "Agnes" claim described as follows:

Beginning at the S. W. corner of claim identical with the S. W. corner of lot No. 3 Section 9 Tp. 29 S. R. 4 east-A monument of stones, where notice is posted, whence the S. W. corner of the original location bears S. 6 deg. West 5.00 chains distant. Thence East on the south boundary of Sec. 9 20.00 chains to the N. E. corner of the S. W. quarter of S. E. quarter of Sec. 9 the S. E. corner of claim monument of stone. Thence north to right bank of Rio Grande a "stake." Thence with meander of Rio Grande north westerly to intersection with the south boundary of N. half of fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 the N. E. corner of a claim post. Thence westerly along south boundary of N. half of S. E. quarter Sec. 9 17.28-100 chains to the west
 158 boundary of lot No. 3 Sec. 9 of the N. W. corner of claim.
 monument of stones; whence the N. W. corner of original claim bears N. 36 deg. west 8.70 chains distant. Thence south 10.00 chains to the place of beginning, containing 18½ acres, more or less, being that part of lot No. 3 Sec. 9 corresponding to fractional S. half of the N. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east.

The "Lulu" claim described as follows:

Beginning at the north west corner of the N. E. quarter of N. E. quarter of S. W. quarter of Section 9 Tp. 29 S. R. 4 east N. M. P. M. a monument of stone. Thence east 18 25.100 chains, to right bank of Rio Grande a post, the N. E. corner. Thence S. E.-ly with meander of Rio Grande to North intersection of dividing line bet. the E. and W. half of the N. W. quarter of the S. E. quarter of Sec. 9—a post. Thence south along said dividing line bet. east and west halves of the N. W. quarter of the S. E. quarter of Sec. 9 to S. E. corner of N. W. quarter of N. W. 4 S. E. quarter of Sec. 9, the S. E. corner of claim—a monument of stones. Thence west along south boundary of N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 10.00 chs. Thence W. along S. boundary of N. E. quarter N. E. chs. Thence W. along S. boundary of N. E. quarter N. E. quarter

S. W. quarter Sec. 9 10 chs. to S. W. cor. of claim a monument of stones. Thence north along west boundary of N. E. quarter of N. E. quarter of Sec. 9 10.00 chs. to place of beginning. Comprising the N. E. quarter of the S. W. quarter and that portion of lot 3 being fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east, containing 19-12-100 acres more or less. This notice is posted at N. W. corner of claim, whence the S. W. corner of the original location bears S. 40 deg. E. 60
159 lks. distant, and N. W. cor. of original location bears N. 2 deg. west 10.20 chains distant.

The "Lynch" claim described as follows:

Beginning at quarter section corner between sections 9 and 16 Tp. 29 S. R. 4 east, the south west corner of claim, monument *on* stones. Thence north 20.00 chs. to N. W. cor. identical with N. W. corner of lot No. 4, monument of stones. Thence east on north boundary of lot No. 4-10.00 chs. to N. E. cor. monument of stones. Thence south 20.00 chs. to line bet. sections 9 and 16 the south east corner, a monument of stones where this notice is posted. Thence west along Section line 10.00 chs. to southwest corner the place of beginning, being that portion of lot No. 4 corresponding to the W. half of the S. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east. Containing 20 acres.

The "Tip Top" claim described as follows:

Beginning at a monument of stones the S. E. cor. of claim identical with the N. E. cor. of N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 S. R. 4 east. Thence north 20.00 chs. to the N. E. corner, a monument of stones, identical with the N. E. cor. of that portion of lot No. 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9. Thence west 10.00 chs. to the N. W. cor. of claim, a monument of stone. Thence south 20.00 chs. to the S. W. cor. of claim, a monument of stones, where this notice is posted. Thence east along section line between 9 and 16, 1.00 chs. to place of beginning, containing 20 acres being that portion of Lot No. 4 of Sec. 9 Tp. 29 S. R. 4 east corresponding to east half of S. W. quarter of Sec. 9 Tp. 29 S. Range 4 east.

The "Aurora" claim described as follows:

Beginning at the N. E. corner of the N. W. quarter of
160 the N. E. quarter of Sec. 16 Tp. 29 South R. 4 East, being the S. W. corner of claim, monument of stone, where this notice is posted. Thence north 20.00 chs. to north boundary of lot No. 4 Sec. 9 the N. W. corner of claim monument of stone. Thence East 15.00 chs. to right bank of Rio Grande, North East corner of claim a post. Thence Southerly with meander of right bank of Rio Grande along each boundary of lot No. 4 Sec. 9 to meander corner on right bank of Rio Grande bet. Sections 9 and 16, the South East corner a post. Thence west along Section line 11 25-100 chs. to the S. W. corner place of beginning. Containing 19 60-100 acres, being that portion of lot No. 4 lying bet. the East boundary of that portion of lot 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 East and the Rio Grande.

That in locating each of the said five claims, the plaintiff did and

performed each and every act required to be done and performed by the laws of the United States, the Territory of New Mexico, and the rules and regulations prevailing in said district, applicable to the location of placer mining claims, and that the plaintiff before making said locations, did discover valuable mineral deposits upon each of the said five claims, and did cause a notice of location of each of them to be recorded on the — day of May, 1906, in the office of the Recorder of the County of Dona Ana.

X.

That the plaintiff did during the year 1906, cause to be performed upon each of the said Lula and Agnes claims, work and improvements of the value of One Hundred Dollars each, and that in the year 1907, the plaintiff did cause to be performed upon or for the improvement and development of each of the said five claims, 161 to-wit, the Lulu, the Agnes, the Lynch, the Tip Top and the Aurora, work and improvements of the value of One Hundred Dollars each; and in the year 1908, the plaintiff did cause to be performed upon or for the improvement and development of each of the said five claims, to-wit, the Lulu, the Agnes, the Lynch, the Tip Top and the Aurora, work and improvements of the value of One Hundred Dollars each.

XI.

That on or about the first day of September, 1908, the plaintiff resumed assessment work upon the said five claims, the Lulu, the Agnes, the Lynch, the Tip Top and the Aurora, for the year 1908, and continued to do said assessment work upon or for the benefit and improvement of the said claims until the defendant undertook to relocate the said Hortense and Aluminum claims as hereinafter found, and that the plaintiff was actually doing said work upon or for the benefit or improvement of the said claims at the time when the defendant so undertook to relocate the said claims.

XII.

That on or about the 11th day of September, 1908, the defendant relocated the territory embraced within the said Hortense and Aluminum claims, the said territory being then a part of the territory covered by the said five claims so located as aforesaid by the plaintiff, and did do and perform each and every act required by the laws of the United States, the Territory of New Mexico, and the rules and regulations of miners in said district with respect to the location of placer mining claims, and did cause the notices of location to be filed on the — day of September, 1908, in the office of the Recorder of the County of Dona Ana, copies of said notices of location being attached to defendant's answer herein.

162

XIII.

That on or about the 25th day of November, 1908, the defendant filed in the United States Land Office at Las Cruces, New Mexico, an

application for United States mineral patent for the Aluminum group of placer mining claims, so-called, consisting of the International and the said Hortense and Aluminum placer claims as re-located on the 11th day of September, 1908, as hereinbefore found, and caused the Register of said Land Office to give notice of said application for patent by publication as required by law; that in and by said application for patent, the defendant set up and alleged that it was the owner and in possession of the said group of placer mining claims, which included the tracts of land and premises covered by the said Lulu, Agnes, Lynch, Tip Top and Aurora claims, and hereinbefore in finding No. IX, described.

XIV.

That the plaintiff on the 30th day of December, 1908, filed in the said office, under oath, a protest and adverse claim against said application of defendant, and for said premises in said finding No. IX, described, in due form, and showing the nature, extent and boundaries of the adverse claim of the plaintiff; and that thereupon further proceedings on said application in said Land Office were stayed, to await the determination by a court of competent jurisdiction, of the right of possession of the said premises in said finding No. IX, described, and the rights of the respective parties therein and thereto; and that to that end, the plaintiff within thirty days after the filing of said protest and adverse claim, did bring and institute this suit.

All as specified in paragraphs Nos. I, II, III, V, VI, VII 163 VIII, IX, X, XI, XII, XIII, XIV, and XV of the plaintiff's requested special findings.

And doth further find:

I.

That there has been no evidence introduced in this case to show whether or not the defendant had resumed labor upon its Aluminum and Hortense mining claims, respectively, before the plaintiff made, or attempted to make locations of said Lulu and Agnes Mining Claims.

II.

That on the 2nd day of August, 1905, the defendant filed in the land office at Las Cruces, New Mexico, its application for patent for a group of mining claims, including said Hortense and Aluminum claims, and accompanied the same with the proofs usually required with reference thereto, except that the affidavit of posting the claim, with notice of application for patent, had been sworn to before a Notary Public in the County of El Paso, State of Texas, and not within the Land District in which such claims were situated, as required by law. That upon the filing of such application the Register and Receiver caused publication to be made of the pendency of such application and on the 23rd day of October, 1905, no adverse claims having been filed by any other person, the said Register and Receiver accepted payment in full from the said defendant at the rate required

by law for the purchase from the United States of placer mining claims and thereupon issued to the said defendant the final receipt for the money so paid, and the entry of such lands in the name and for the benefit of the said defendant was thereupon placed upon the records of such Receiver and Register as having been duly perfected and made.

164

III.

There is no evidence introduced to show whether at the time of the location of said Tip Top, Aurora and Lynch mining claims and the re-location of such Lulu and Agnes mining claims by the plaintiff aforesaid in the year 1906, the defendant had resumed work upon the ground embraced in such claims or either thereof.

IV.

That on the — day of September, 1908, and subsequent to the decision of the Secretary of the Interior or cancelling such final receipt and entry of such Hortense and Aluminum placer mining claims, and the waiver of defendant of any right to move for review of such decision, the defendant made amendatory locations in accordance with law of substantially the same ground embraced in said Hortense and Aluminum mining claims and embracing all of the ground contained within the Lynch, Tip Top, Aurora, Lulu and Agnes mining claims, claimed by plaintiff upon which mineral has even been discovered by plaintiff previous to location and amendatory location thereof.

All as specified in paragraphs Nos. V, VI, VII and X of defendant's requested special findings.

And doth refuse the findings contained in paragraph No. IV, of plaintiff's requested special findings and the findings contained in paragraphs Nos. I, II, III, IV, VII, IX, XI, XII, XIII, XIV and XVI of the defendant's requested special findings.

Conclusions of Law

I.

That the application of the defendant for patent on the 2nd of August, 1905, and the paper purporting to be a final receipt
165 issued and given to the defendant by the Receiver of the Land Office at Las Cruces, were, from their inception, void, a nullity and of no effect.

II.

That the location by the plaintiff of the Lulu and Agnes placer mining claims made in April, 1905, and the re-locations and locations of the Lulu, Agnes, Lynch, Aurora and Tip Top claims, made by the plaintiff in May, 1906, were at the time when made, upon public domain of the conformity with the laws of the United States

and with the United States open to mineral location and were made in Territory of New Mexico, and with the rules and regulations of miners in said district, and that by reason of said locations and the assessment work done by the plaintiff upon some claims, the plaintiff at the time of said locations, became, and now is, entitled to the possession of the territory covered by the said locations, and in finding IX described.

III.

That the plaintiff is entitled to judgment against the defendant accordingly.

It is therefore considered and adjudged that the plaintiff, John H. McKnight, do have and recover the possession of the following described premises and tracts of land, all situated in Section 9 of Township 29, South of Range 4, east of New Mexico's Principal Meridian, in the County of Dona Ana, Territory of New Mexico, to-wit:

"Agnes" Placer Mining Claim.

Beginning at the S. W. corner of claim identical with the S. W. corner of lot No. 3 Section 9 Tp. 29 S. R. 4 east—A monument of stones, where notice is posted, whence the S. W. corner of the original location bears S. 6 deg. West 5.00 chains distant.

Thence East on the south boundary of Sec. 9 20.00 chains to the N. E. corner of the S. W. quarter of S. E. quarter of Sec. 9 the S. E. corner of claim monument of stone. Thence north to right bank of Rio Grande a "stake." Thence with meander of Rio Grande north-westerly to intersection with the south boundary of N. half of fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 the N. E. corner of a claim post. Thence westerly along south boundary of N. half of S. E. quarter Sec. 9 17.28-100 chains to the west boundary of lot No. 3 Sec. 9 of the N. W. corner of claim, monument of stones; whence the N. W. corner of original claim bears N. 36 deg. west 8.70 chains distant. Thence south 10.00 chains to the place of beginning, containing 18 1-2 acres, more or less, being that part of lot No. 3 Sec. 9 corresponding to fractional S. half of the N. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east.

The "Lulu" Mining Claim described as follows:

Beginning at the north west corner of the N. E. quarter of N. E. quarter of S. W. quarter of Section 9 Tp. 29 S. R. 4 east N. M. P. a monument of stone. Thence east 18 25.100 chains, to right bank of Rio Grande a post, the N. E. corner. Thence S. E.-ly with meander of Rio Grande to North intersection of dividing line bet. the E. and W. half of the N. W. quarter of the S. E. quarter of Sec. 9—a post. Thence south along said dividing line bet. east and west halves of the N. W. quarter of the S. E. quarter of Sec. 9 to S. E. corner of N. W. quarter of N. W. 4 S. E. quarter of Sec. 9, the S. E. corner of claim—a monument of stones. Thence west along south boundary of N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 10.00 chs. Thence W. along S. boundary of N. E. quarter N. E. quarter S. W. quarter Sec. 9 10 chs. to S. W. cor. of claim a monument of stones. Thence north along west boundary of

N. E. quarter of N. E. quarter of Sec. 9 10.00 chs. to place of beginning. Comprising the N. E. quarter of the S. W. quarter and that portion of lot 3 being fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east, containing 19-12-100 acres more or less. This notice is posted at N. W. corner of claim, whence the S. W. corner of the original location bears S. 40 deg. E. 60 lks. distant and N. W. cor. of original location bears N. 2 deg. west 10.20 chains distant.

The "Lynch" Placer Claim described as follows:

Beginning at quarter section corner between sections 9 and 16 Tp. 29 S. R. 4 east, the south west corner of claim, monument of Stones. Thence north 20.00 chs. to N. W. cor. identical with N. W. corner of lot No. 4, monument of stones. Thence east on north boundary of lot No. 4—10.00 chs. to N. E. cor. monument of stones. Thence south 20.00 chs. to line bet. sections 9 and 16 the south east corner, a monument of stones where this notice is posted. Thence west along Section line 10.00 chs. to southwest corner, the place of beginning, being that portion of lot No. 4 corresponding to W. half of the S. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east. Containing 20 acres.

The "Tip Top" Mining Claim, described as follows:

Beginning at a monument of stone the S. E. corner of 168 claim identical with the N. E. cor. of N. W. *half* of N. E. quarter of Section 16, Tp. 29 S., R. 4 east. Thence North 20.00 chains to the N. E. corner, a monument of stone.—identical with the N. E. corner of that portion of lot No. 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9. Thence West 10.00 chains to the N. W. corner of claim—a monument of stone. Thence South 20.00 chs. to the S. W. corner of claim—a monument of stone, where this notice is posted. Thence East along Section lines between 9 and 16—10.00 chains to place of beginning, containing 20 acres being that portion of lot No. 4 Sec. 9 Tp. 29 S. Range 4 East corresponding to East half of S. W. quarter of Sec. 9, Tp. — S., Range 4 East.

The "Aurora" Mining Claim, described as follows:

Beginning at the N. E. corner of the N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 South R. 4 East, being the S. W. corner of claim, monument of stone, where this notice is posted. Thence north 20.00 chs. to north boundary of lot No. 4 Sec. 9 the N. W. corner of claim monument of stone. Thence East 15.00 chs. to right bank of Rio Grande, North East corner of claim a post. Thence Southerly with meander of right bank of Rio Grande along east boundary of lot No. 4 Sec. 9 to meander corner on right bank of Rio Grande bet. Sections 9 and 16, the South East corner a post. Thence west along Section line 11 25-100 chs. to the S. W. corner place of beginning. Containing 18 60-100 acres, being that portion of lot No. 4 lying bet. the east boundary of that portion of lot No. 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S., R. 4 East and the Rio Grande.

169 Which said findings of fact, conclusions of law and judgment are endorsed upon the back in the words and figures following, to-wit:

No. 2849. John H. McKnight vs. El Paso Brick Company. Findings of fact, Conclusions of Law and Judgment. Third Judicial District Court, County of Dona Ana. Filed in my office this 17th day of December, 1910. Jose R. Lucero, Clerk. To be entered of record five days after the filing thereof.

And afterwards, to-wit: On the 29th day of December, 1910, there was filed by the Clerk, Defendant's motion to re-open and vacate the Judgement, which said Motion is in the words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, Dona Ana County.

No. 2849.

J. H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendants.

And now comes the defendant herein by its attorneys and moves the court to re-open and vacate the judgment rendered herein if the same be now final, and amend the findings of fact as made or proposed by the court so as to correspond to the findings thereof as requested by defendant and particularly that the findings of fact by the court numbered V. may be stricken therefrom altogether, or if

170 such motion to strike the same is overruled then that the same may be modified so that the findings of the court therein contained as to the failure of defendant to perform labor or make improvements upon the mining claims therein named shall only apply to the year 1904 instead of applying thereto and also to the years previous to such date, and for grounds for such motion states and shows to the court that under sub-section 136 of 2685, the compiled laws of New Mexico and the rules of this court, it was and now is entitled to have notice of any judgment rendered herein (such cause having been taken under advisement and judgment therein not having been rendered at the time of the hearing therein) previous to the entering of the same, served upon its attorneys, and, also, to have served thereupon a copy of the same, together with a notice that the same would be submitted to the court for its approval and signature upon a day certain, as provided in Rule 21 of the Rules Applicable to Practice in the District Courts of New Mexico, and that the only notice or information which has been served upon or has come to the attention of the defendant's attorneys with reference to such judgment is contained in a letter from the Deputy District Court Clerk, enclosing a copy of a judgment already signed by the Court which letter is attached hereto;

and also, that such findings of fact and judgement are in the opinion of the counsel erroneous and that the matters of fact found and determined in the 5th finding of fact by the court above mentioned, were and are erroneous as a whole and that the same, in so far as it determines no labor or improvements were ever done or performed upon the claims therein named previous to 1904, was of matters and facts not in issue before the Court and the Court

171 had no jurisdiction to render any findings of fact with reference thereto.

HAWKINS & FRANKLIN AND
H. B. HOLT,
Attorneys for Defendant, El Paso, Texas.

STATE OF TEXAS,
County of El Paso, ss:

W. A. Hawkins being duly sworn on his oath, says that he is one of the attorneys for the defendant in the above entitled case, that he has read the foregoing motion and knows the facts therein stated and that the same are true

In witness whereof I have hereunto set my hand and seal on this, the 28th day of December, 1910.

[SEAL.]

JOHN D. MASON,
Notary Public, El Paso County, Tex.

Department of Justice, Clerk's Office.

Third Judicial District Court, Territory of New Mexico.

5735.

LAS CRUCES, N. M., Dec. 17th, 1910.

Messrs. Hawkins & Franklin, El Paso, Texas.

GENTLEMEN: At the request of Mr. Wade, attorney for the plaintiff, in cause No. 2849, McKnight vs. El Paso Brick Co., I herewith enclose you a copy of brief and judgment in said cause for consideration.

Yours very truly,

JOSE R. LUCERO, *Clerk.*
By JOHN LEMON, *Deputy.*

172 Which said motion is indorsed upon the back in the words and figures following, to-wit:

No. 2849. In the District Court of the Third Judicial District of the Territory of New Mexico, Dona Ana County. J. H. McKnight, Plaintiff vs. El Paso Brick Company, Defendants. Third Judicial District Court, County of Dona Ana. Filed in my office this 29th day of December, 1910. Jose R. Lucero, Clerk. Hawkins & Franklin, Attorneys for Defendant, El Paso, Texas.

And afterwards, to-wit: On the 23rd day of January, A. D. 1911, there was filed by the clerk an order, which was ordered to be entered of record, and is in the words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, Sitting within and for the County of Dona Ana.

Civil. No. 2849.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK CO., Defendant.

Order.

Now comes the above named plaintiff, by Edward C. Wade, 173 his attorney, and comes also the above named defendant, by Hawkins & Franklin, its attorneys, and this cause comes on to be heard upon the findings and judgment therein entered under date of December 22, 1910, and upon the motion of the above named defendant to vacat- and set aside the said findings and judgment, to amend the findings of fact as made by the court so as to correspond to the findings thereof as requested by the defendant, to strike therefrom the finding of fact numbered V., and if such motion to strike the same shall be overruled then to modify the same so that the findings of the court therein contained as to the failure of the defendant to perform labor or make improvements upon the mining claims therein named shall only apply to the year 1904 instead of applying thereto and also to the years previous to such date. Now the Court having heard the arguments of counsel and being fully advised in the premises, and it appearing that the said findings and judgment were prematurely and improvidently entered, doth order that the said findings and judgment be, and the same are hereby set aside and vacated and be deemed and considered as the proposed findings and judgment of the court in the premises.

And it is further ordered and adjudged that finding V. of said proposed findings and judgment be and the same is hereby modified, and the court doth find as follows:

V.

That neither the locators of the said Hortense or Aluminum claims or either of the said claims or any of the said locators or the said defendant, or any of its predecessors in interest did or performed or caused to be done or performed the annual labor or im- 174 provements required by law upon or for either of the said claims for or during the year 1904 or for or during the year 1905.

And it is further ordered and adjudged that the findings and judgment herein heretofore entered under date of December 22,

1910, and finding V., as herein above modified and stated be and the same are hereby found and declared to be the findings and final judgment of the court in the premises to the same effect as if herein fully and at large set forth and be taken as entered of this date.

And it is further ordered and adjudged that the said motion be and the same is hereby otherwise overruled; to which the defendant excepts.

Dated at Las Cruces, N. M., this the 19th day of January, A. D. 1911.

FRANK W. PARKER, *Judge*.

O. K.

W. A. H.

Which said order is indorsed upon the back in the words and figures following, to-wit:

Civil. No. 2849. J. H. McKnight, Plaintiff, vs. El Paso Brick Co., Defendant. Order. Third Judicial District Court, County of Dona Ana. Filed in my office this 23rd day of January, 1911. Jose R. Lucero, Clerk.

And afterwards, to-wit: On the 21st day of February, A. D. 1911, there was filed by the Clerk, Defendant's motion for allowance of appeal, which said motion is in the words and figures following to-wit:

175 In the District Court of the Territory of New Mexico, Sitting in and for the County of Dona Ana.

No. 2849.

J. H. McKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendants.

Motion for Allowance of Appeal.

Now comes the defendant in the above entitled cause and moves the court to grant it an appeal to the supreme court of the Territory of New Mexico from the judgment and decree of the court rendered in this cause and to fix and determine the amount of bond which will be required in order that the judgment rendered herein and execution for cost and writ of possession in accordance with such decree may be superseded, and that upon the filing of an appeal bond for costs that execution for the costs incurred herein be superseded, and that upon the filing of the supersedeas bond in the amount as fixed by the court, that the judgment of the Court and issuance of writ of possession ordered by the court be superseded.

H. B. HOLT AND
HAWKINS & FRANKLIN.

Attorneys for Defendants.

Which said motion is indorsed upon the back in the words and figures following, to-wit:

No. 2849. J. H. McKnight, vs. El Paso Brick Company. Motion for Allowance for Appeal. Third Judicial District Court, County of Dona Ana. Filed in my office this 21st day of February, 1911. Jose R. Lucero, Clerk.

176 And afterwards, to-wit: On the 21st day of February, A. D. 1911, there was filed by the clerk and entered of record an order, which said order is in the words and figures following, to-wit:

In the District Court of the Territory of New Mexico, Sitting in and for the County of Dona Ana.

No. 2849.

J. H. McKnight, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendant.

Order.

This cause coming on to be heard upon the motion of defendant for an order allowing an appeal to the Supreme Court of the Territory of New Mexico from the Judgment and Decree of the Court rendered in this cause and for the fixing of supersedeas bond, it is ordered that said motion of defendant for an appeal be granted and that the said defendant be and it hereby is allowed to appeal to the Supreme Court of the Territory of New Mexico from the Judgment and Decree heretofore rendered in this cause:

And it is further ordered that the defendant file an appeal bond for the security of costs to be incurred upon such appeal within the time required by law, and that upon the filing of said bond, execution for costs herein be stayed and superseded.

It is further ordered by the court that defendant be and it hereby is allowed to file a supersedeas bond in the sum of One Thousand Dollars, and that upon the filing of the same within the time allowed by law, the judgment and order of the court herein and issuance of the writ of possession herein be and the same hereby is superseded.

177 Done at Las Cruces, New Mexico, February 20th, 1911.

FRANK PARKER,

District Judge.

O. K.

WADE & WADE.

Which said order is indorsed upon the back in the words and figures following, to-wit:

No. 2849. Third Judicial District Court, County of Dona Ana,

Territory of New Mexico. J. H. McKnight, vs. El Paso Brick Company. Order. Third Judicial District Court, County of Dona Ana. Filed in my office this 21st day of February, 1911. Jose R. Lucero, Clerk. Hawkins & Franklin and H. B. Holt, Attorneys for Defendant.

And afterwards, to-wit: On the 9th day of March, A. D. 1911, there was filed *by* the Clerk an Appeal Bond, which said Bond is in the words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, for Dona Ana County.

No. 2849.

J. H. McKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendants.

178

Appeal Bond.

Know all men by these presents, That we, the El Paso Brick Company, a corporation, as principal, and United States Fidelity & Guaranty Co. (a corporation) of Baltimore, Maryland, as surety, are held and firmly bound unto John H. McKnight in the penal sum of one thousand (1,000) dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, administrators and executors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of March, A. D. 1911.

The condition of the foregoing obligation is such that whereas the above named John H. McKnight obtained a judgment on the 19th day of January, 1911, in the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Dona Ana, against the above bounden El Paso Brick Company, adjudging that he, the said John H. McKnight have and recover the possession of certain premises and tracts of land situated in Section nine (9) of Township twenty-nine (29), South of Range four (4) East, New Mexico Principal Meridian, in the County of Dona Ana and Territory of New Mexico, the same being certain mining claims known as the Agnes Mining Claim, the Lulu Mining Claim, the Lynch Mining Claim, the Tip Top Mining Claim and the Aurora Mining Claim, together with all costs of suit; and

Whereas the above named El Paso Brick Company prayed for and was granted, on the 9th day of March, A. D. 1911, an appeal to the Supreme Court of the Territory of New Mexico from the said judgment of said District Court; and

Whereas, in and by said order, granting said appeal, it was further provided that said El Paso Brick Company be allowed to file a supersedeas bond in the sum of one thou-

said (\$1,000.00) dollars, and that upon the filing of the same within the time allowed by law, the said judgment and order of the court and the issuance of writ of possession be superseded:

Now therefore, should the above bounden El Paso Brick Company prosecute its said appeal with due diligence in the Supreme Court of the Territory of New Mexico, and if the decision of the court below be affirmed, or such appeal be dismissed, and the said El Paso Brick Company complies with the decree and judgment aforesaid of the District Court and pays all damages and costs adjudged against it in the said District Court and in the said Supreme Court on such appeal, then this obligation shall be void, otherwise the same shall remain in full force and effect.

EL PASO BRICK COMPANY,
By FRED J. WECKERLE,
President-Principal.

Attest:

E. HEWITT RODGERS,
Secretary.

UNITED STATES FIDELITY & GUAR-
ANTY CO., BALTIMORE, MD.,
HENRY D. BOWMAN,
[SEAL.] *Attorney in Fact, Surety.*

STATE OF TEXAS,
County of El Paso, ss:

On this 5th day of March, A. D. 1911, before me appeared Fred J. Weckerle, to me personally known, who being by me duly sworn, did say that he is the president of the El Paso Brick Company, the corporation mentioned in the foregoing instrument and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said E. Hewitt Rodgers acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this the day and year in this certificate first above written.

[SEAL.] GROVER C. SUGGS,
Notary Public in and for El Paso County, Tex.

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

On this 9th day of March, A. D. 1911, before me appeared Henry D. Bowman, to me personally known, who, being by me duly sworn, did say that he is the attorney in fact for the United States Fidelity and Guarantee Company, of Baltimore, Maryland, and that the seal affixed to said instrument is the seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation, by authority of its board of directors, and said Henry D. Bowman

acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate above written.

[SEAL.]

WM. ALEX. SUTHERLAND,
Notary Public, Dona Ana County, N. M.

My commission expires June 26, 1912.

This bond as to form and sufficiency of sureties is this day approved by me.

[SEAL.]

JOSE R. LUCERO, *Clerk,*
By JOHN LEMON, *Deputy.*

Which said Appeal Bond is endorsed upon the back in the words and figures following, to-wit:

181 No. 2849. In the District Court, Third Judicial District, Territory of New Mexico, County of Dona Ana, John H. McKnight, Plaintiff, vs. El Paso Brick Company, Appeal Bond, Third Judicial District Court, County of Dona Ana. Filed in my office this 9th day of March, 1911. Jose R. Lucero, Clerk. By John Lemon, Deputy. Hawkins & Franklin, Attorneys for Defendant.

And afterwards, to-wit, on the 28th day of March, A. D. 1911 there was issued by the clerk, a citation, which said citation is in the words and figures following, to-wit:

Citation.

TERRITORY OF NEW MEXICO:

To John H. McKnight, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the Territory of New Mexico, to be holden at the City of Santa Fe, in the County of Santa Fe, and Territory of New Mexico, one hundred and thirty days from the date hereof, pursuant to an appeal granted by the District Court of the Third Judicial District of the Territory of New Mexico, sitting within and for the County of Dona Ana, to the El Paso Brick Company from a final judgment rendered by the said District Court in your favor and against said El Paso Brick Company, in that certain cause lately pending in said Court, wherein you said John H. McKnight, is plaintiff, and the said El Paso Brick Company is defendant, to answer said appeal and show cause, if any there be, why said judgment should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Frank W. Parker, Associate Justice of the Supreme Court of the Territory of New Mexico, and presiding Judge of the Third Judicial District Court, thereof, and the seal of said Court, this 28th day of March, A. D. 1911.

JOSE R. LUCERO, *Clerk.*

Which said citation is endorsed thereon and on the back thereof, in the words and figures following, to-wit:

We, the undersigned, attorneys of record for the plaintiff, John H. McKnight, to whom the attached citation is directed, hereby acknowledge service of the same on this date and for and on behalf of said John H. McKnight, hereby enter his and our appearance in said cause mentioned in said citation, in the Supreme Court of the Territory of New Mexico, Las Cruces, New Mexico, March 28, 1911.

Wade & Wade, Attorneys for John H. McKnight, Plaintiff.
183 2849. In the District Court, of the Third Judicial District, of the Territory of New Mexico, for Dona Ana County. John H. McKnight, Plaintiff, vs. El Paso Brick Company, Defendant. Citation. Third Judicial District Court, County of Dona Ana. Filed in my office this 30th day of March, 1911. Jose R. Lucero, Clerk.

And afterwards, to-wit, on the 28th day of March, A. D. 1911, there was filed by the Clerk a *Præcipe* for Record, which said *Præcipe* is in the words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, in and for Dona Ana County.

No. 2849.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendant.

Præcipe for Record.

To the Clerk of the above styled Court:

184 You are hereby requested by the defendant forthwith to prepare a transcript of all the proceedings, records, and files in the above styled cause, including the following, to-wit:

The complaint of Plaintiff.

The Answer of Defendant.

The Reply of Plaintiff.

The Waiver of Jury Trial.

The Findings of Fact.

Conclusions of Law.

Final Judgement of the Court.

The Special Findings asked for by Defendant.

The Special Findings asked by Defendant.

All Exhibits.

Defendant's Motion to Vacate Judgment, and a Judgment of the Court Thereon.

All Bills of Exceptions.

The Transcribed notes of the Stenographer of the testimony in the Case.

Defendant's Motion for Appeal.
 Order of Court Allowing Same.
 Supersedeas Bond.
 The Citation to Plaintiff.
 This Preceipe.

Certificate of the Clerk as to the costs in the case in the District Court, including Clerk's and stenographer's fees for the transcript of the record and the taking and transcribing of the testimony.

Respectfully,

HOLT & SUTHERLAND,
 HAWKINS & FRANKLIN,
Attorneys for Defendant.

Postoffice Address, El Paso, Texas.

185 Which said preceipe is endorsed on the back in the following words and figures, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Dona Ana. John H. McKnight vs. El Paso Brick Company. No. 2849. Preceipe for record. Third Judicial District Court, County of Dona Ana. Filed in my office this 28th day of March, 1911. Jose R. Lucero, Clerk. Hawkins and Franklin, Attorneys for Defendant, El Paso, Texas.

And afterwards, to-wit, on the 10th day of April, A. D. 1911, there was filed by the Clerk a preceipe, which said preceipe is in words and figures, as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, for Dona Ana County.

No. 2849.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY.

In the matter of the above entitled cause, you will please tax in favor of the plaintiff and against the defendant, the sum
 186 of one hundred and fifty (\$150) dollars, being one-half the expense incurred in transcribing the testimony and preparation of an original and two carbons thereof by one — Frazier in the above e-titled cause, it being stipulated between the parties thereto that such expense should be borne in equal proportion by the respective parties, in the first instance, and that the amount paid by the prevailing party should be taxed as costs against the losing party.

Very Respectfully,

WADE & WADE.

Which said *præcipe* is endorsed upon the back in the words and figures following, to-wit:

No. 2849. In the Third Judicial District Court of the Territory of New Mexico, in and for the County of Dona Ana. John H. McKnight, Plaintiff, vs. El Paso Brick Company, Defendant. *Præcipe*. Third Judicial District Court, County of Dona Ana. Filed in my office this 10th day of April, 1911. Jose R. Lucero, Clerk. By John Lemon, Deputy. Wade & Wade, Attorneys for the Plaintiff, Las Cruces, New Mexico.

187 And afterwards, to-wit: on the first day of May, A. D. 1911, there was filed by the Clerk a stipulation waiving certificate of Stenographer to transcript of testimony, etc., which said stipulation is in words and figures, following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, for Dona Ana County.

No. 2849.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, Defendant.

Comes now the plaintiff, by E. S. Ives, Esq., and Edward C. Wade, Esq., his attorneys, and stipulate and agree with Messrs. Hawkins & Franklin and Holt & Sutherland, attorneys for the defendant, that certificate by stenographer to the transcript of his stenographic notes of the testimony in this case may be and the same is hereby waived, and that the transcript of such testimony heretofore made and filed by the stenographer in the office of the clerk of this court may be and the same is hereby accepted and considered with the same force and effect and to the same extent as though same had been duly certified by the stenographer who took such testimony and transcribed the same.

And it is further stipulated that the making of copies of the original plats and maps introduced in evidence as exhibits upon the trial of this cause before the judge of this court be and the same is hereby waived; that said original plats and maps may be transmitted by the clerk of this court to the clerk of the supreme court of the territory of New Mexico, and used in said supreme court in such manner as may be desired, and as fully and to the same extent as though copies thereof were made and incorporated in the record.

188 Dated at Las Cruces, N. M., this first day of May, A. D. 1911.

EDWARD C. WADE,

Las Cruces, N. M.,

Attorney for Plaintiff.

Which said stipulation is endorsed upon the back in the words and figures following, to-wit:

In the Third Judicial District Court of the Territory of New Mexico, within and for the County of Dona Ana. No. 2849. John H. McKnight, Plaintiff, vs. El Paso Brick Company, a corporation, Defendant. Stipulation waiving certificate of stenographer to transcript of testimony, etc. E. S. Ives and Edw. C. Wade, Attorneys for Plaintiff. Hawkins & Franklin, El Paso, Tex., Holt & Sutherland, Las Cruces, N. M., Attorneys for Defendant. Third Judicial District Court, County of Dona Ana. Filed in my office this first day of May, 1911. Jose R. Lucero, Clerk.

And afterwards, to-wit, on the 12th day of June, A. D. 1911, there was filed by the clerk a motion for order extending
189 time for settling and signing bill of exception- and assignment of errors, which said motion is in words and figures, following, to wit:

In the Third Judicial District Court of the Territory of New Mexico
Within and for the County of Dona Ana.

No. 2849. Civil.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, a Corporation, Defendant.

Comes the defendant by Hawkins & Franklin and Holt & Sutherland its attorneys and moves the court for an order extending the time for settling and signing the bill of exceptions and assignment of errors for the period of thirty (30) days beyond the time when same is required to be filed under and in accordance with the provisions of Sec. 20, of chap. 57 of the laws of 1907, as amended by sec. 1, of chap. 120 of the laws of 1909 and as grounds for said motion show- to the court that said Hawkins & Franklin who are leading counsel for defendant, for several weeks have been and are still engaged in the trial of an important law suit in the district court at El Paso, Texas, which has occupied and for some time is likely to occupy their exclusive time and attention to the above-entitled cause.

HAWKINS & FRANKLIN,

El Paso, Tex.,

HOLT & SUTHERLAND,

Las Cruces, N. M.,

Attorneys for Defendant.

Which said motion is endorsed upon the back in the words and figures, following to-wit:

190 In the Third Judicial District Court of the Territory of New Mexico, within and for the County of Dona Ana. No. 2849. John H. McKnight, Plaintiff, vs. El Paso Brick Company,

a corporation, Defendant. Motion for order extending time for settling and signing bill of exceptions and signing assignment of errors. Third Judicial District Court, County of Dona Ana. Filed in my office this 12th day of June, 1911. Jose R. Lucero, Clerk. Hawkins & Franklin, El Paso, Tex., Holt & Sutherland, Las Cruces, N. M., Attorneys for Defendants.

And afterwards, on the 12th day of June, A. D. 1911, there was filed by the clerk and ordered to be entered of record, an order extending time for settling and signing of bill of exceptions and filing and service of assignment of errors thirty days beyond the expiration of time for same, which said order is in words and figures following, to-wit:

"In the Third Judicial District Court of the Territory of New Mexico,
Within and for the County of Dona Ana.

No. 2849. Civil.

JOHN H. MCKNIGHT, Plaintiff.

vs.

EL PASO BRICK COMPANY, a Corporation, Defendant.

191 * This cause coming on this day to be heard upon the application of plaintiff, by its attorneys, for an order extending the time for the settling and signing of the bill of exceptions and the filing and service of the assignment of errors herein, and the court having heard said motion and application and being fully advised in the premises, doth grant the same.

It is therefore considered, ordered and adjudged by the court that the time for the settling and signing of the bill of exceptions and for filing and service of the assignment of errors herein by and on behalf of defendant and appellant be and the same is hereby extended for the period of thirty (30) days from and after the expiration of the time for the settling and signing of said bill of exceptions and for the filing and service of such assignment of errors, as prescribed by the provisions of section 20, chapter 57, of the laws of 1907, as amended by section 1, chapter 120, of the laws of 1909.

Dated at Las Cruces, New Mexico, June 9, 1911.

FRANK W. PARKER, *Judge, etc.*

Which said Order is endorsed upon the back in words and figures as follows, to-wit:

No. 2849, Civil. In the district court of the Territory of New Mexico, Third Judicial District, County of Dona Ana. John H. McKnight, Plaintiff, vs. El Paso Brick Company, Def. Order extending time for settling and signing bill of exceptions and
192 filing and service of assignment of errors thirty days beyond expiration of time for same. Third Judicial District Court County of Dona Ana. Filed in my office this 12th day of June,

1911. Jose R. Lucero, Clerk. Hawkins — Franklin, El Paso, Tex., and Holt & Sutherland, Las Cruces, N. M., Attorneys for Defendants.

And afterwards, to-wit: on the 24th day of June, A. D. 1911, there was filed by the clerk and ordered to be entered of record an order, which said order is in words and figures following, to-wit:

In the Third Judicial District Court of the Territory of New Mexico
Within and for the County of Dona Ana.

No. 2849. Civil.

JOHN H. MCKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, a Corporation, Defendant.

This cause coming on this day to be heard upon stipulation heretofore entered into between counsel for respective parties, plaintiff and defendant waiving the making of copies of maps and plats introduced in evidence upon the trial of this cause, and providing that the originals of such maps and plats may be transmitted
193 by the clerk of this court to the clerk of the supreme court and used in the supreme court in such manner as may be desired and as fully and to the same extent as though copies thereof were made and incorporated into the record: and it appearing to the court that it is necessary and proper that such original maps and plats should be inspected in the Supreme Court upon the appeal herein:

It is therefore considered, ordered and adjudged by the court here, that the stipulation of the counsel above referred to be, and the same is hereby approved and confirmed, and that the clerk of this court be, and he is hereby authorized and directed to forward all such original maps and plats to the Clerk of the Supreme Court of New Mexico, at Santa Fe, New Mexico, by express, such papers to be there retained pending consideration of the appeal herein and thereupon to be disposed of as the said Supreme Court shall order.

Las Cruces, New Mexico, June 24th, 1911.

FRANK W. PARKER, *Judge, etc.*

Which said Order is endorsed upon the back in words and figures following to-wit:

No. 2849. Filing follows. John H. McKnight, Plaintiff, vs. El Paso Brick Company, Defendant. Third Judicial District Court Dona Ana County, New Mexico. Filed in my office this 24th day of June, 1911. Jose R. Lucero, Clerk.

194 And afterwards, to-wit: on the 29th day of June, A. D. 1911 there was filed by the clerk a stipulation waiving incorporation into the record of exhibits "A" and "B" to stipulation

entered into at close of trial, which said stipulation is in words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico Within and for the County of Dona Ana.

No. 2849. Civil.

JOHN H. M'KNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, a Corporation, Defendant.

It Is Hereby Stipulated by and between the counsel for the respective parties, plaintiff and defendant, in the above entitled cause, that the incorporation in the transcript of record to be used upon the appeal of this cause in the appellate courts of exhibits "A" and "B" to the stipulation: heretofore entered into between said counsel at the close of the testimony in this cause, and which stipulation immediately follows the certificate of the Presiding Judge of this court in the record herein as prepared for the appeal to the supreme court of New Mexico, be and the same is hereby waived.

Datd at Las Cruces, New Mexico, June 28th, 1911.

WADE & WADE,

Las Cruces, New Mexico,

Attorneys for Plaintiff.

HOLT & SUTHERLAND,

Las Cruces, New Mexico,

Attorneys for Defendant.

195 Which said stipulation is endorsed upon the back in the words and figures following, to-wit:

No. 2849. In the District Court, of the Third Judicial District of the Territory of New Mexico, within and for the County of Dona Ana. John H. McKnight, Plaintiff, vs. El Paso Brick Company, a Corporation, Defendant. Stipulation—Waiving incorporation into record of exhibits "A" and "B" to stipulation entered into at close of trial. Third Judicial District Court, county of Dona Ana. Filed in my office this 29th day of June, 1911. Jose R. Lucero, Clerk. Holt & Sutherland, Las Cruces, N. M., Attorneys for Plaintiff.

And afterwards, to-wit: on the first day of July, A. D. 1911 there was filed by the clerk a praecipe, which said praecipe is in words and figures following to-wit:

In the Third Judicial District Court of the Territory of New Mexico
Within and for the County of Dona Ana.

No. 2849. Civil.

JOHN H. McKNIGHT, Plaintiff,

vs.

EL PASO BRICK COMPANY, a Corporation, Defendant.

196 To the clerk of the above styled court: In addition to the transcript which you have heretofore been requested to prepare in this cause, you are hereby requested to prepare a transcript of the following records and filed in the above entitled cause:

Stipulation filed May, 1911.

Motion filed June 12, 1911, for an order extending time for setting and signing bill of exceptions and assignment of errors. Order filed and entered of record June 12, 1911, providing for the use upon appeal of original maps and plats.

Stipulation filed this date waiving the incorporation into the record of exhibits "A" and "B" to stipulation entered into between counsel at the close of the testimony.

Dated at Las Cruces, N. M., June 28, 1911.

HAWKINS & FRANKLIN,

El Paso, Tex.:

HOLT & SUTHERLAND,

Las Cruces, N. M.,

Attorneys for Defendant.

Which said Præcipe is endorsed upon the back in words and figures following, to-wit:

No. 2849. In the District Court of the Third Judicial District of the Territory of New Mexico, within and for the county of Dona Ana. John H. McKnight, Plaintiff, vs. El Paso Brick Company, a Corporation, Defendant. Præcipe. Third Judicial
197 District Court, County of Dona Ana. Filed in my office this first day of July, 1911. Jose R. Lucero, Clerk. Hawkins & Franklin, El Paso, Tex., and Holt & Sutherland, Las Cruces, N. M., Attorneys for Defendants.

TERRITORY OF NEW MEXICO.

County of Dona Ana, ss:

I, Jose Lucero, clerk of the district court of the Third Judicial district of the Territory of New Mexico, within and for the county of Dona Ana, do hereby certify that the foregoing and hereto attached 417 pages of typewritten matter is a full, true and complete copy and transcript of all the pleadings, proceedings, record and of exceptions in a case lately pending in the district court in which John H. McKnight was plaintiff, and El Paso Brick Company, a corporation, was defendant, No. 2849 on the civil docket of said

Third Judicial District Court for said county of Dona Ana, as the same remains of record in my office.

I further certify that the costs taxed in said cause No. 2849 are as follows:

To the plaintiff, \$180.70.

To the defendant, \$208.70.

Witness my hand and the seal of said court this the first day of July, A. D. 1911.

JOSE R. LUCERO, *Clerk.*

198 And afterwards, on to-wit, *on* the eighteenth day of July

A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is, in the following words and figures, to-wit:

199 In the Supreme Court of the Territory of New Mexico,

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK Co., Appellant.

Appellant's Assignment of Errors.

Comes now the El Paso Brick Company, appellant in the above styled and numbered cause, and alleging that the following manifest errors to its prejudice intervened in the trial and decision of the above styled cause, assigns such errors for review and correction by this court.

First. The trial court erred in finding the law and facts with the appellee and against the appellant and in adjudging that the appellee was entitled to the possession of the ground covered by the Agnes, Lulu, Lynch, Tip Top and Aurora Mining Claims, and awarding appellee writ of possession, for the reason that the facts shown in the evidence and the law applicable thereto show that the appellee is not entitled to such possession or to such a writ.

Second. The trial court erred in not making the conclusions of law requested by appellant in its said findings of facts and conclusions of law, which conclusions of law were substantially as follows:

"The court finds under the facts above determined that the defendant is entitled to the possession of all of the premises adversely claimed by the plaintiff in the complaint filed herein, and that the defendant is not guilty as alleged in such complaint."

200 Third. The trial court erred in holding that by reason of any location or re-location and assessment work done by appellee upon the Lulu mining claim, appellee became, and then was, entitled to the possession of the territory covered by said Lulu mining claim.

Fourth. The trial court erred in holding that, by reason of any

location or re-location and assessment work done by appellee upon said Agnes mining claim, appellee became, and then was, entitled to the possession of the territory covered thereby.

Fifth. The trial court erred in holding that by reason of the location and assessment work done by the appellee upon the Lynch mining claim, appellee became, and then was, entitled to the possession of the territory covered thereby.

Sixth. The trial court erred in holding that, by reason of the location of and assessment work done by appellee upon the Aurora mining claim, appellee became, and then was, entitled to the possession of the territory covered thereby.

Seventh. The trial court erred in holding that, by reason of the location and assessment work done by appellee upon the Tip Top mining claim, the appellee became, and then was, entitled to the possession of the territory covered thereby.

Eighth. The trial court erred in finding that the locators of the Hortense and Aluminum claims did not receive any consideration for the conveyance of the same to the appellant.

Ninth. The trial court erred in refusing to make the finding requested by appellant in paragraph second of its requested findings of fact and conclusions of law, which is substantially in words and figures as follows:

"That there is no evidence to show what, if any, labor was done or performed by either said locators of said Aluminum and Hortense Placer Mining Claims, or of said defendant as the grantee thereof, previous to the year 1903, but the undisputed evidence shows that in the years 1903 and 1904 One Hundred Dollars' worth of mining labor was done and performed upon each thereof, for each of said years, by the defendant."

Tenth. The trial court erred in failing to hold that the evidence showed that during and for the year 1903 the appellant and its predecessors did and performed on and for the Aluminum and Hortense Mining Claims, One Hundred Dollars' worth of mining labor as required to be done by law.

Eleventh. The trial court erred in not holding that during and for the year 1904 there was done by the appellant and its predecessors in the title thereto upon and for the Aluminum and Hortense Placer Claims One Hundred Dollars' worth of mining labor as required by law.

Twelfth. The trial court erred in finding that neither locators of the Hortense or Aluminum claims or either of said claims or any of the locators or the appellant, or any of its predecessors in interest, did or performed or caused to be done or performed, the annual labor or improvements required by law upon or for either of said claims for or during the year 1904.

Thirteenth. The trial court erred in finding that neither the locators of the Hortense or Aluminum claims, or either of said claims, or any of the locators or the appellant, or any of its predecessors in interest, did or performed or caused to be done or performed, the annual labor or improvements required by law upon or for either of the said claims for or during the year 1905.

Fourteenth. The trial court erred in refusing to make the finding

requested in paragraph third of appellant's requested findings of fact and conclusions of law, which is substantially in words and figures as follows:

"That on or about the 1st day of April, 1905, the plaintiff entered into and upon a portion of such Hortense and Aluminum mining claims so claimed by the defendant and erected monuments thereupon and caused a location notice to be posted upon each thereof, and shortly thereafter to be filed and recorded in the office of the Probate Clerk and Ex-Officio Recorder of Dona Ana County; that at the time of the doing of such acts by plaintiff both the Hortense and Aluminum mining claims were valid subsisting locations on the land embraced therein and the same, nor any part thereof, were not subject to location or re-location by the plaintiff or other person."

Fifteenth. The trial court erred in refusing to make the finding requested by appellant in paragraph seventh of its requested findings and conclusions, which is substantially in words and figures as follows:

"That on or about the — day of May, 1906, and while such final receipts so previously issued to defendant was outstanding and uncanceled, and while the entry of such Aluminum and Hortense mining claims previously made, or attempted to be made by the defendant, was uncanceled of record, the plaintiff entered into and upon such Hortense and Aluminum Placer Claims and thereupon erected other monuments and placed location notices thereupon, respectively, for three additional mining claims known as the Lynch, the Tip Top, and the Aurora claims, and also placed amendatory location notices upon the Lulu and Agnes claims previously located by him, and that such plaintiff then caused such original and amendatory location notices to be duly recorded in the office of the Probate Clerk and Ex-Officio Recorder of Dona Ana County, New Mexico; but that at the time when such original location notices of the Tip Top, Aurora and Lynch mining claims were made, and at the time when such amendatory location notices of said Lulu and Agnes mining claims were made, or attempted to be made, all of the ground embraced therein upon which plaintiff had made any discovery of mineral had been segregated from the public domain by the previous entry thereof made by defendant, and the same was not then subject to location under the laws of the United States and remained segregated until the cancellation of such final receipt and of such entry in the month of September, 1908."

Sixteenth. The trial court erred in finding, as shown by paragraph sixth of its finding, that on or about the first day of April, 1905, when the appellee located the Aluminum, Tip Top, Lulu, Agnes and Lynch mining claims, the same were located upon public domain of the United States open to mineral entry.

Seventeenth. The trial court erred in finding that the ground covered by appellee's location had not been, prior to the time when he made the same, appropriated by the appellant.

Eighteenth. The trial court erred in the first paragraph of its

conclusions of law, which paragraph is in words and figures as follows

"That the application of the defendant for patent on the 2nd of August, 1905, and the paper purporting to be a final receipt issued and given to the defendant by the Receiver of the Land Office at Las Cruces, were from their inception, void, a nullity and of no effect."

Eighteenth—A. The trial court erred in refusing to make the finding requested by appellant in paragraph ninth of its requested findings of facts and conclusions of law which paragraph is substantially as follows:

"There is no evidence to show whether at the time of the location of the Tip Top, Aurora and Lynch, and the amendatory location of the Lulu and Agnes claims in 1906, the ground embraced therein, or either thereof, was public domain, except such evidence as relates to the same or portions thereof being claimed by the defendant and the plaintiff, respectively."

Nineteenth. The trial court erred in not finding as requested by appellant that at the time when the plaintiff entered upon the ground covered by the Lynch, Tip Top, Aurora, Lulu and Agnes claims, in May, 1906, and attempted to locate the same, and while
204 the final receipt issued to appellant was outstanding and uncanceled, all of the ground embraced therein had been segregated from the public domain by the appellant's location of the Aluminum and Hortense mining claims and was then not subject to location under the laws of the United States.

Twentieth. The trial court erred in concluding as a matter of law that the location by the appellee of the Lulu mining claim in April, 1905 was at the time made public domain of the United States open to mineral entry.

Twenty-first. The trial court erred in holding that the location of the Agnes mining claim made in April, 1905, was at the time when made upon the public domain of the United States open to mineral entry.

Twenty-second. The trial court erred in holding that the relocation of the Lulu mining claim made in May, 1906, was at the time when made upon public domain of the United States open to mineral entry.

Twenty-third. The trial court erred in holding that the relocation of the Agnes mining claim was at the time when made upon public domain of the United States open to mineral entry.

Twenty-fourth. The trial court erred in holding that the location of the Lynch mining claim, made by the appellee in May 1906 was at the time when made upon public domain of the United States open to mineral entry.

Twenty-fifth. The trial court erred in holding that the location of the Aurora mining claim made by the appellee in May 1906 was at the time when made upon public domain of the United States open to mineral entry.

Twenty-sixth. The trial court erred in holding that the location of the Tip Top mining claim made by appellee in 1906 was at the

time when made upon public domain of the United States open to mineral entry.

Twenty-seventh. The trial court erred in refusing to make the findings of fact requested by the appellant in paragraph eleventh of its requested findings of fact and conclusions of law, which paragraph is substantially in words and figures as follows:

205 "That the original notice of location of the Lulu and Agnes mining claims made by plaintiff in the year 1905 did not comply with the laws of the United States and of the Territory of New Mexico, in that the same did not contain reference to any natural object or permanent monument, as is required by law, and were therefore void."

Twenty-eighth. The trial court erred in not holding, as requested by defendant, that the original notices of location of the Lulu and Agnes did not contain any reference to any natural object or permanent monument as is required by law and that the same were void.

Twenty-ninth. The court erred in making the following findings of fact:

"That at the time of the location of the said 'Lulu' and 'Agnes' claims there was only one Southern Pacific Railroad yard limit post in the County of Dona Ana, New Mexico, and that the said yard limit post was in the vicinity of the said claims, and that the description of the said claims in the said notices of location was sufficiently definite to enable any one to identify the said claims upon the ground."

Thirtieth. The trial court erred in finding that the description of the Lulu and Agnes claims was sufficiently definite to enable any one to identify said claims upon the ground.

Thirty-first. The trial court erred in finding that there was only one Southern Pacific Railroad yard limit post in the County of Dona Ana, New Mexico, at the time when the appellee located the Lulu and Agnes claims.

Thirty-second. The trial court erred in refusing to make the finding requested by appellant in the twelfth paragraph of its requested findings of fact and conclusions of law, which is substantially in words and figures as follows:

206 "That the location notices of the Lynch, Tip Top and the Aurora and the amendatory location notices of the Lulu and Agnes mining claims made by the plaintiff in the year 1906 were not in compliance with the law, in that the same were not made with reference to any natural object or permanent monument, and were therefore void."

Thirty-third. The trial court erred in the ninth paragraph of its findings, in finding that the appellee being the owner of the Lulu and Agnes Claims, re-located the territory embraced within the said Lulu and Agnes Claims, and located other territory adjacent and contiguous thereto by five placer mining claims, named respectively, Lulu, Agnes, Lynch, Tip Top and Aurora.

Thirty-fourth. The trial court erred in refusing to make findings requested in paragraph thirteenth of appellant's requested findings of fact and conclusions of law, which paragraph is substantially in words and figures as follows:

"That even in event the original and amendatory locations of the Lulu and Agnes vested in the plaintiff the right and the possession of the ground embraced therein, yet the evidence shows that the plaintiff failed to do the annual amount of labor required upon each of such claims for the year 1907 and the defendant had the lawful right to and did forfeit the rights of the plaintiff to the ground embraced in such claim by the amendatory locations of the Aluminum and Hortense mining claims made by the defendant in September, 1908."

Thirty-fifth. The trial court erred in refusing to make the findings requested by appellant in paragraph fourteenth of its requested findings of facts and conclusions of law, which paragraph is substantially in words and figures as follows:

"That even in event the original locations of the Tip Top, Aurora and Lynch vested in the plaintiff the right to the possession of the ground embraced therein, yet the evidence shows that the plaintiff failed to do the annual amount of labor required upon each of such claims for the year 1907 and the defendant had the lawful right to and did forfeit the rights of the plaintiff to the ground embraced in such claims by the amendatory locations of the Aluminum and Hortense mining claims made by the defendant in September, 1908."

Thirty-sixth. The trial court erred in making the finding contained in paragraph X of its findings of fact, which paragraph is substantially in words and figures as follows:

"That the plaintiff did during the year 1906, cause to be performed upon each of the said Lulu and Agnes claims, work and improvements of the value of one hundred dollars each, and that in the year 1907 the plaintiff did cause to be performed upon or for the improvement and development of each of the said five claims, to wit, the Lulu, the Agnes, the Lynch, the Tip Top and the Aurora, work and improvements of the value of one hundred dollars each; and in the year 1908, the plaintiff did cause to be performed upon or for the improvement and development of each of the said five claims, to wit, the Lulu, the Agnes, the Lynch, the Tip Top and the Aurora, work and improvements of the value of one hundred dollars each."

Thirty-seventh. The trial court erred in finding that the appellee did during the year 1907, cause to be performed upon or for the improvement and development of the Lulu, Agnes, Aurora, Tip Top and Lynch mining claims, work and improvements of the value of one hundred dollars.

Thirty-eighth. The trial court erred in refusing to make the findings of fact contained in paragraph fifteenth of appellant's requested findings of fact and conclusions of law, which paragraph is substantially in words and figures as follows:

"The original description of the Lulu mining claim contained in the location notice of the same departed from the ground contained therein as marked as monumented, to such an extent that such location notice did not contain such an accurate description thereof as required by law."

Thirty-ninth. The trial court erred in refusing to make the findings contained in paragraph sixteenth of appellant's requested findings of fact and conclusions of law, which paragraph is substantially in words and figures as follows:

"The original description of the Agnes mining claim made by the plaintiff contained in the location notice thereof departed from the true description of the ground as marked and monumented, to such an extent that such location notice did not contain such an accurate description thereof as required by law."

Fortieth. The trial court erred in finding with reference to the Lulu and Agnes mining claims, as shown by paragraph sixth of its findings of fact, that the appellee did each and every act required to be done and performed by the laws of the United States and the Territory of New Mexico and by the rules and regulations prevailing in the land district in which said claims were situated.

Forty-first. The trial court erred in the second paragraph of its conclusions of law, which paragraph is to this effect in substance:

"That the location by the plaintiff of the Lulu and Agnes placer mining claims made in April 1905, and the re-locations and locations of the Lulu, Agnes, Lynch, Aurora and Tip Top claims made by the plaintiff in May, 1906, were at the time when made upon public domain of the United States open to mineral location, and were made in conformity with the laws of the United States and with the Territory of New Mexico, and with the rules and regulations of miners in said district, and that by reason of said locations and the assessment work done by the plaintiff upon said claims, the plaintiff at the time of said locations, became and now is, entitled to the possession of the territory covered by the said locations, and in finding IX described."

Forty-second. The trial court erred in holding that the appellee was actually doing assessment work upon the said five mining claims claimed by it when appellant undertook to re-locate the said

209 Aluminum mining claim.

Forty-third. The trial court erred in holding that the territory covered by the re-locations made by appellant on the Hortense and Aluminum was at the time when such locations were made a part of the territory covered by the five claims located by appellee.

Forty-fourth. The trial court erred in finding, in paragraph fourteen of its findings, that the appellee filed a protest and adverse claim against the application of appellant in due form, and showing the nature, extent and boundaries of the adverse claim of appellee.

Forty-fifth. The trial court erred in allowing plaintiff to introduce over the objections of the defendant the original and amended location notices of the Agnes and Lulu and original notices of the Tip Top, Lynch and Aurora mining claims, being the same instruments referred to in the pleadings upon which plaintiff's cause of action is based.

Respectfully submitted,

HAWKINS & FRANKLIN,

P. O. Address E. Paso, Texas;

HOLT & SUTHERLAND,

P. O. Address Las Cruces, N. M.,

Attorneys for Appellant.

210 And afterwards, on to-wit, on the fourteenth day of August, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion by appellee in the above entitled cause, which said motion by appellee was, and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico,

Number —.

JOHN H. MCKNIGHT, Appellee,
vs.
EL PASO BRICK COMPANY, Appellant.

Motion for a Resetting.

Now comes the above named appellee, J. H. McKnight, by Wade & Wade and E. S. Ives, his attorneys, and moves the court that he be granted further time within which to prepare and file his printed brief, to-wit, a period of three weeks from the first day of this court and that the said cause may be reset for hearing at a date after the time allowed for the filing of the said brief as herein prayed.

And as grounds for this motion appellee specifies as follows:

That the said cause has been set for hearing in the said court for the 21st day of August, A. D. 1911, as appears by the calendar of said court; that the appellant did not serve upon the attorneys of the appellee a copy of their printed record of the proceedings of the trial court until Monday the 7th day of August, A. D. 1911, and did not serve upon said attorneys copies of their brief as filed in
211 the said court until on or about the 10th day of August, A. D. 1911; that it was impracticable, if not impossible, for the appellee's counsel to prepare their brief until they shall have received a copy of said printed record nor to have prepared and printed the brief for appellee and argument until informed touching matters complained of by the appellant and the authorities cited and arguments made in support of their contention; and that the period remaining between the time of filing this motion and the date of said hearing is too short within which to cause to be prepared, printed, filed and served the copies of the appellee's proposed brief; that the matters of law assigned by the appellant for consideration by this court are numerous, important and to some extent novel and heretofore undetermined by this court.

(Signed)

WADE & WADE.

Attorneys for Appellee, Las Cruces, New Mexico.

And Afterwards, on to-wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D. 1911, on the twenty-second day of the said regular term, the same being Tuesday, August 15, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Appeal from District Court Dona Ana County.

212 Now comes Edward C. Wade, Jr., and moves the Court to admit Mr. E. S. Ives, a member of the bar of the Supreme Court of the Territory of Arizona, in good standing, for the purpose of this cause, and the Court being sufficiently advised in the premises.

It is therefore considered and adjudged by the Court that he, Mr. E. S. Ives, a member in good standing of the Supreme Court of the Territory of Arizona be, and he hereby is admitted to the bar of this Court for the purposes of this cause.

And Afterwards, on to-wit, *on* the thirty-fifth day of the said regular term, the same being Monday November 27 A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Appeal from District Court Dona Ana County.

It is ordered by the Court that this cause be, and the same hereby is continued for the term, upon stipulation of counsel.

And afterwards, on to-wit, *on* the first day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a stipulation by counsel, which said stipulation was, and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

213

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Whereas, from an examination of the printed transcript of record in this cause, it appears that there are various errors therein, in order to correct same it is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that corrections shall be made in said printed transcript of record as follows, to-wit:

On page 420, on the 17th line, change the year "1911" so as to read "1901."

On page 424, strike from the second and third lines the words "660 feet to a monument of stone." On page 425 strike out the same words from the nineteenth and twentieth lines.

On page 426, after the word "proof" at the end of the sixteenth line, insert the words "of posting the notice of defendant's intention to apply for."

On page 444, after the word "the" at the end of the eighth line, transpose the context of lines 9, 10 and 11 so as to read as follows: "United States open to mineral location and were made in conformity with the laws of the United States and with the Territory of New Mexico."

On page 447, after the words "Rio Grande" at the end of the last paragraph, insert:

"And that writ of possession do issue therefor, and that plaintiff have his costs to be taxed; to all of which defendant excepts

214 "Dated at Las Cruces, New Mexico, this 17th day of December, A. D. 1910.

(Signed)

FRANK W. PARKER, *Judge.*"

HAWKINS & FRANKLIN,

HOLT & SUTHERLAND,

Attorneys for Appellant.

WADE & WADE,

EUGENE S. IVES,

Attorneys for Appellee.

And afterwards, on to-wit, on the first day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion of the Land Office of the United States of America, in cause E-5308, which said opinion of the Land Office was and is in the following words and figures, to-wit:

W. W. B.

1-480.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., November 21, 1911. *

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true and literal exemplification of an original opinion dated July 29, 1911, in case of the Stock Oil Company, as the same appears on file in this Department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

215

[SEAL.]

(Signed)

SAMUEL ADAMS,

First Assistant Secretary of the Interior.

F. W. L.

6-1991.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Jul- 29, 1911.*

E-5308.

"N."

Douglas M. A. 03250.

EX PARTE STOCK OIL COMPANY.

Rejection of Application. Reversed.

Appeal from the General Land Office.

This is an appeal by the Stock Oil Company from the decision of the Commissioner of the General Land Office, dated January 10, 1911, holding for rejection its application for patent to the Zeta oil placer mining claim, embracing the N.E. $\frac{1}{4}$, Sec. 25, T. 40 N., R. 79 W., Douglas, Wyoming, land district, for the reason that the proof of posting upon the land and the application for patent were verified before a notary public who was one of the attorneys for the company in prosecuting its application proceedings, and that new affidavits, duly executed, could not be filed *nunc pro tunc* to cure such defects.

Numerous departmental decisions are cited by the Commissioner in support of his holding, and under such authority the decision rejecting the application is not unwarranted.

In the briefs accompanying the appeal it is contended that the affidavits mentioned were not null and void, but were at most voidable and can be amended and the defect cured *nunc pro tunc*.

In view of the contentions urged by counsel, the Department has been persuaded to enter upon a careful re-examination of the question, notwithstanding the course of the later decisions, with a view to ascertaining whether a more rigid interpretation of the letter of the statute has not been indulged than is warranted by a due regard for the purpose and spirit of the mining laws and the legislative intent expressed therein.

Section 2325 of the Revised Statutes requires that the application for patent for a mining claim shall be under oath, and that the evidence of posting of notice upon the claim shall be "an affidavit of at least two persons that such notice has been duly posted." Section 2325 of the Revised Statutes provides that all affidavits required under the mining laws may be verified before any officer authorized to administer oaths within the land district.

The basis for holding that the attorney for the applicant is disqualified from acting as a notary is found in the act of June 29,

1906 (34 Stat., 622), which is an act amendatory of section 558 of the Code of the District of Columbia, but which is contended to be applicable in certain of its features to notaries outside of the District of Columbia. The act cited concludes as follows:

That no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent, or in which he may be in any way interested before any of the Departments aforesaid.

217 The position contended for is that the provisions of the mining statute in regard to the verifications in question were mandatory and jurisdictional, and that where the preliminary affidavits were not verified in accordance therewith the defect was fatal and left the land department absolutely without power to entertain or proceed with the patent application.

It may be observed that the mining laws were enacted for the purpose of developing the mineral resources of the public domain. In the construction of statutes, among others, the following principle of interpretation has been laid down by the authorities:

Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purpose of the statute. (Sutherland on Statutory Construction, section 447.)

In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be clearly gathered from the statute construed in the light of other rules of interpretation. (Endlich on the Interpretation of Statutes, paragraph 437.)

The Supreme Court of Kansas is an early case, *Jones v. State* (1 Kans., 279), said:

In other words, unless a fair construction of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely.

218 A search among reported cases upon analogous questions has been made and many decisions are found in which the above principle of construction has been invoked and applied. In the case of *Cooper v. Reynolds* (10 Wall., 308, 319), where, in a collateral suit a judgment under which realty had been sold pursuant to constructive notice and attachment was attacked as "void," the Supreme Court said:

If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to attachment, when such a writ is returned into court, the power of the court over the res is estab-

lished. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities, but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment.

But when the writ has been issued, the property seized, and that property been condemned and sold, we can not hold that the court had no jurisdiction for want of a sufficient publication of notice.

In the case of Fitzpatrick v. Flannagan (106 U. S., 648) the court held (syllabus):

219 Leave to amend the affidavit, by inserting a new ground for an attachment sued out in Mississippi, is not the subject of a valid exception, it not appearing that the defendant was thereby prejudiced.

In the case of Tilton et al. v. Coffield et al. (93 U. S., 163, 166), in reference to the judicial power of courts to permit amendments, the Supreme Court of the United States said:

Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually, to permit or refuse, rests in the discretion of the court; and the result in either case is not assignable for error. This subject was fully examined in *Tierman's Executors v. Woodruff*, 5 McLean, 135. It is there shown, that both in the English and American courts amendments have been allowed in well-considered cases, for the purpose of introducing into the suit a new and independent cause of action. This was going further than the court went in permitting the amendments made by the appellants. It has also been held, upon full consideration, that "courts have the power to amend their process and records, notwithstanding such amendment may affect existing rights." *Greene v. Cole*, 13 Ired. Law, 425.

Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. Cases of this kind, too numerous to be cited, may be found, in which amendments in the most important particulars were permitted to be made. We refer to some of these adjudications. *McKnight v. Strong*, 25 Arkansas, 212; *Talcott v. Rosenbury*, 8 Abb. Pr. N. S., 287; *Vanderheyden v. Gary*, 3 How. Pr., 367; *Tully v. Herrin*, 44 Miss., 627; *Wadsworth v. Cheeney*, 13 Iowa, 576; *Jackson v. Stanley*, 2 Ala., 326; *Winkle v. Stevens*, 9 Iowa, 264; *Wood v. Squires*, 28 Mo., 397; *Scott v. Macy*, 3 Ala., 250; *Johnson v. Huntington*, 13 Conn.,

47.

220 In the Wisconsin case of *Sueterlee v. Sir* (25 Wis., 357) a judgment was attacked, upon appeal, because no evidence

of constructive notice by publication and posting was included in the record when judgment was entered or when the appeal was taken, and it was there said:

It is further claimed, that the record does not contain any legal proof of the publication of the summons. Publication of the summons was in fact legally made, but, through inadvertence, and affidavits of publication and of posting of the summons and complaint were not filed at the time judgment was entered. The court, upon motion, allowed this proof to be supplied after the appeal was taken, and that those affidavits might be filed as of the day of judgment was entered. We suppose it was entirely competent for the court to supply this omission. * * * The only question is, as to what effect the supplying this proof should have upon the appeal. We think the only effect would be to give the appellant the right to dismiss the appeal without costs. It certainly can furnish no ground for reversing the judgment. The record shows proper publication of the summons, and that the court had acquired jurisdiction.

In *Swearingen v. Howser* (14 Pac., 436) the Supreme Court of Kansas held that the district court erred in ordering the dissolution of an attachment where the attachment affidavit was verified before the plaintiff's attorney acting as notary, the Kansas code providing that the officer before whom depositions (affidavits) are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding, and where at the hearing on motion to dissolve, an amended affidavit, properly verified, was presented. The court held that the attachment affidavit originally filed was at most only voidable and was capable of being
221 amended.

In the case of *Pierce v. Butters* (21 Kans., 124, 129) it was said:

The affidavit of publication and the publication together were sufficient in this case to bring the defendants into court. Such affidavit and publication were at most only voidable; and as the affidavit for publication and the affidavit in proof of publication were both amended and made sufficient before either of the affidavits or the publication was set aside or voided, neither of them will now be set aside or voided. That is, the first affidavit was defective, but not void. The publication of the notice taken by itself was regular and valid, but taken in connection with the affidavit for publication, was irregular and voidable, but not void. The service, therefore, though defective, was sufficient until set aside by some direct proceeding instituted for that purpose. If the first affidavit or the publication of notice had been void, then the proceedings could not have been amended. For where defendants are not brought into court by the original proceedings, then no amendments can be made that will bring them into court, and the proceedings will remain void.

In the case of *Long v. Fife* (45 Kans., 271), an action against a non-resident prosecuted by attachment, the court held that the

affidavit for publication might be amended, and, when so amended, related back to the commencement of the action.

In the case of *Harrison v. Beard* (30 Kans., 352), the court said that the affidavit for service by publication was defective and insufficient, but not void, and that the plaintiff, even after judgment, was entitled, by leave of the court, to make the affidavit good by sufficient amendment.

In the case of *Burr v. Seymour* (43 Minn., 401), the court held that a defective affidavit of publication of summons might
222 be cured by allowing the proper affidavit of publication to be filed *nunc pro tunc*, saying:

The jurisdiction of the court was acquired by the fact of service and not from the proof of it filed.

In the case of *Johnson v. Puritan M. & M. Co.* (47 Pac., 337, 340), the Supreme Court of Montana held that, under a statute requiring petitions (the initial pleadings) in civil actions to be verified, a judgment by default, in a case where the petition was entirely without verification, was good as against collateral attack, and that the want of such verification was not a jurisdictional flaw and did not render the judgment void.

In bankruptcy proceedings it was held, *In re Donnelly* (5 Fed., 783, 787, 789):

Jurisdiction does not depend upon the manner or the method of verifying either the petition or proofs of debt.

It follows, from this view, that any irregularity in verifying the petition, or the debts of the petitioning creditors, may be amended, *nunc pro tunc*, if any amendment is deemed necessary to make the proceedings regular.

Many other decisions from the courts might be cited wherein the principle of allowing amendment to voidable pleadings has been laid down, but the above are deemed amply sufficient for present purposes.

In this connection, then, it may be observed that in the procedure under the mining laws the "application for patent" bears a close analogy to the initial pleading—declaration, petition, complaint, or otherwise as it may be styled in the several jurisdictions—in a judicial proceeding. Again, the published and posted notice of the application is "process"; and the preliminary affidavit of the posting of the notice and plat upon a mining claim, and proof of the publication and of continuous posting of the notice, correspond

in legal effect to the sheriff's or marshal's return where
223 personal service has been had, or to the preliminary affidavits and the proofs of publication, etc., where in appropriate cases substituted service has been resorted to. To refuse to give to the rules governing the elements of a court's jurisdiction the equivalent force and effect with respect to the foundations of the jurisdiction of the land department to entertain and proceed with an application for mineral patent, would be to require in the latter a greater degree of strictness than exists in judicial proceedings. This is deemed both unreasonable and unnecessary.

In his work on mines, second edition, Mr. Lindley has this to say:

SEC. 680. As the land department is a special tribunal, charged with the administration of the public land laws, exercising not only executive but judicial powers, an application to obtain a patent addressed to that tribunal should recite all facts necessary to show jurisdiction in the Department to convey the particular tract applied for to the particular individual applying for it. * * * A petition or application thus framed presents a foundation for such corroborative evidence as is required by the rules. * * * The proceedings by which its jurisdiction is invoked should be conducted fairly on the line of proceedings in rem in courts of common law or equity jurisdiction.

SEC. 713. The proceedings by which the patent for a mining claim is obtained are essentially in rem, and are binding upon all the world so far as any unrepresented adverse claim is concerned.

They are judicial. The publication and posting of notice of the application for patent is a process which brings all adverse claimants into court—a summons—to all persons whose interests may be affected by the issuance of a patent to the tract applied for, to appear and file their adverse claims.

An examination of the reported decisions of the Department in regard to entries other than under the mining law discloses the same spirit of liberality as is set forth in the above-cited decisions.

In the case of *Fidelo C. Sharp* (35 L. D., 179), it was held (syllabus):

A homestead entry allowed upon an application executed outside the land district wherein the land is located is not for that reason void, but voidable merely. * * *

See also *Cleavis v. Smith* (22 L. D., 486), involving a homestead application.

In the case of *Michael Leahy* (22 L. D., 114), it was held that the preliminary preemption affidavit should be executed within the district in which the land is situated, but where not so made an entry may be equitably confirmed even where such affidavit was not in fact amended. See also *Orvis v. Borne* (17 L. D., 90).

In the case of *Daniel C. Boomer* (18 L. D., 364), the same principle was applied to desert-land application papers executed outside of the county where the land was situated and outside the land district. In regard to a timber-culture entry in the case of *Brox v. Tobias* (17 L. D., 400), where the preliminary affidavit was executed outside the district and the State, the same was held to be not void, but voidable, and amendment was permitted.

In the case of *Johnston v. Bane* (27 L. D., 156), it was held (syllabus):

The failure of an applicant for the right of entry to sign his application is not a fatal defect, where the accompanying affidavits are properly executed; and the local office in such a case should suspend action on the application, and allow the applicant a reasonable time within which to cure the defect.

225 In the case of *Bright v. Elkhorn Mining Co.* (9 L. D., 503, 505), one which is substantially on all fours with the

case at bar, Secretary Noble, among other things, in his decision of October 26, 1889, said:

It is claimed by counsel for the protestants in their brief, that the affidavit of A. F. Bright and J. L. Smith, as to the posting of such plat and notice filed in the local office in obedience to the requirement of section 2325 of the Revised Statutes, was void and without legal effect, because made before a notary public (one John H. Shober), who, it is alleged, was at the time of taking the same attorney for the company, and also interested pecuniarily in the claim.

Conceding that at the date of said affidavit Shober was interested pecuniarily in the claim in controversy, and was the general attorney for the Elkhorn Mining Company in all matters relative to its interests in respect of said claim, can it be reasonably contended that these facts, presented at this late day, should avail the protestants to secure the cancellation of the entry in question? I think not. It seems to me that if said affidavit were technically defective for the reasons stated, admitting them to be founded on fact, the proper time to have taken advantage of such defect was when the affidavit was presented and filed for action thereon by the local officers, and before the entry was made. It is too late, in my judgment, to raise the question of such supposed defect, which, if indeed a defect at all, is purely technical in its nature, after the affidavit has been acted upon by the local office and the entry allowed. It should be borne in mind that it is the fact of posting the plat and notice on the claim, that forms in part the basis of the applicant's claim for patent. The affidavit is, more properly speaking, the means prescribed by which the fact of such posting is to be shown.

The provision of the statute, in respect to such affidavit, is, 226 that after the applicant for patent shall have posted the plat of his claim and notice of his application, as required, he "shall file an affidavit of at least two persons that such notice has been duly posted." It was evidently the intention of Congress, by this provision, to prescribe what should be offered by the applicant, and accepted by the Government, as ex parte proof of the act of posting, and also the manner in which such proof should be presented. In this case the directions of the statute in this respect were strictly followed. The affidavit filed, being in all respects, therefore, in due form, was accepted by the officers of the Government and the entry allowed without objection being made. * * * There can be no question, in my judgment, even admitting the affidavit to have been originally defective in respect of the points named, that the entry attacked must be sustained. At most the defects charged could have rendered the affidavit voidable only, and not void absolutely, and it is too late, after the purposes of the affidavit have been fully accomplished, as in this case, to raise with avail the question of the defects claimed, conceding them to be such.

In the case at bar the application, as executed, and its accompanying affidavit of posting were received and acted upon by the local officers as sufficient, and responsive to the notice thereupon issued an adverse claim was filed, pursuant to which suit was season-

ably instituted and prosecuted to judgment in favor of the applicant company. Mineral entry was allowed November *qq*, 1910. Since then the patent application and the affidavits which have been called in question have been superseded in the record by others so executed as to conform to the requirements of the law, as they have been interpreted, and with the regulations thereunder, and with these amendments the record is now complete and correct in that respect.

227 In view of the facts disclosed and authorities cited, the Department is of opinion that the rejection of the application would result in an unnecessary hardship and delay and is not demanded by any interests either of the Government or any possible adverse parties.

The rule embodied in the foregoing authorities is not, however, to be considered an encouraging or condoning a lax observance of the specific provisions of the mining laws, and whenever substantial defects of the character in question occur, apart from whatever might seasonably be taken of them by those claiming adversely, the parties interested must assume the burden of their correction. The desired result will be materially aided if the local officers are careful to scrutinize each application for patent as it is presented and permit none to proceed further except it and the accompanying papers are found to be, or shall be made, regular.

The Department accordingly holds that, even if it be conceded that the statute quoted is applicable outside of the District of Columbia, there being no question as to the fact of notice, the verification of the application and affidavits is properly subject to amendment, and in this case that has been done. In so far, therefore, as the case of El Paso Brick Company (37 L. D., 155), and others to the same effect, are inconsistent with the views and conclusion above expressed and reached, they are hereby overruled and superseded.

In the absence of other objections, the Stock Oil Company's application for patent and the entry will be allowed to proceed in due course. The Commissioner's decision herein, to the contrary, is reversed.

(Signed)

SAMUEL ADAMS,

First Assistant Secretary.

228 And Afterwards, on to-wit, on the thirty-eighth day of the said regular term, the same being Friday December 1, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1403.

JOHN MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Appeal from District Court, Dona Ana County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by John Frank-

lin, Esq. and W. A. Hawkins, Esq. for appellant, and E. C. Wade, Jr. and Eugene S. Ives, Esq. for appellees, and submitted to the Court, and the Court not being sufficiently advised in the premises, takes the same under advisement.

And Afterwards, on to-wit, *on* the sixteenth day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an affidavit and stipulation of value, which said affidavit and stipulation of value was, and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, Appellant.

229

Stipulation.

Now come the said Appellant and Appellee in the above styled cause and stipulate and agree that the matter in dispute in this cause exclusive of all costs, exceeds the sum of Five Thousand Dollars (\$5000.00) and respectfully, in support of said stipulation, attach hereto the affidavit of the President of Appellant, and respectfully request the Court to so find in its judgment that the value of said matter in dispute in this cause exclusive of all costs exceeds the sum of Five Thousand Dollars (\$5000.00).

Dated this ninth day of December 1911.

(Signed)

WADE & WADE AND

EUGENE S. IVES,

Attorneys for Appellee.

HAWKINS & FRANKLIN,

Attorneys for Appellant.

In the Supreme Court of the Territory of New Mexico.

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, Appellant.

Affidavit.

STATE OF TEXAS,

County of El Paso, ss.:

Frederick J. Weckerle, of lawful age, being duly sworn, on his oath states that he is President of the El Paso Brick Company, the

Appellant in the above styled cause, that he is familiar with the above styled cause and the value of the property and matter
 230 in dispute in the same, and that the value of the matter in dispute in said cause, exclusive of all costs, exceeds the sum of Five Thousand Dollars (\$5000.00).

[SEAL.]

(Signed)

FREDERICK J. WECKERLE.

Subscribed and sworn to before me this ninth day of December 1911.

(Signed)

JOHN D. MASON,

Notary Public.

My commission expires June 1, 1913.

And Afterwards, on to-wit, *on* the forty-eighth day of the said regular term, the same being Saturday December 23, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1403.

JOHN H. McKNIGHT, Appellee.

vs.

EL PASO BRICK COMPANY, a Corporation. Appellant.

Appeal from District Court, Dona Ana County.

This cause having been argued by counsel, submitted to and taken under advisement by the Court upon a former day of the present term, and the Court being now sufficiently advised in the premises announces its decision by Associate Justice Mechem, Chief Justice Pope and Associate Justices McFie, Abbott, Wright and Roberts concurring, affirming the judgment of the Court below for reasons stated in the opinion of the Court on file.

It is therefore considered and adjudged by the Court that the judgment of the District Court in and for the County of
 231 Dona Ana whence this cause came into this Court be, and the same hereby is affirmed, and that in accordance therewith;

It is therefore considered and adjudged, the *the* plaintiff John H. McKnight do have and recover the possession of the following described premises and tracts of land, all situate in Section 9 of Township 29 South of Range 4 east of New Mexico's Principal Meridian, in the County of Dona Ana, Territory of New Mexico, to-wit:

"Agnes Mining Claim," described as follows:

Beginning at the S. W. corner of claim identical with the S. W. corner of Lot No. 3 Section 9 Tp. 29 S. R. 4 east—a monument of stones, where notice is posted, when the S. W. corner of original location bears S. 6 deg. west 5.00 chains distant. Thence east on south boundary of Lot No. 3 Sec. 9 20.00 chains to east corner of the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 9 the S. E. corner of claim—monument of stone. Thence north to right bank of Rio Grande "Stake." Thence with meander of Rio Grande northwesterly to intersection

with the south boundary of N. $\frac{1}{2}$ of fractional N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 9 the N. E. corner of claim—post. Thence west-
 10.00 chains to the west boundary of Lot No. 3 Sec. 9 the N. W. corner
 of claim monument of stone, whence the N. W. Corner of original
 claim bears north 36 deg. west 8.70 chains distant. Thence south
 10.00 to place of beginning, containing $18\frac{1}{2}$ acres, more or less,
 being the part of Lot No. 3 Sec. 9 corresponding to fractional S.
 $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 9 Tp. 29 S. 4 east.

"Lulu Mining Claim," described as follows:

Beginning at the N. W. corner of N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of S.
 W. $\frac{1}{4}$ of Sec. 9 Tp. 29 S. R. 4 east of N. M. P. M., a monument of
 stone. Thence east 18-25-100 chains, to right bank of Rio
 232 Grande—a post the N. E. corner. Thence S. E'ly with the
 meander of Rio Grande to north intersection of dividing
 line between the E. and W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$
 of Sec. 9—a post. Thence south along said dividing line bet. east
 and west halves of the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 9 to S. E. corner
 of N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 9, the S. E. corner of
 claim—a monument of stones. Thence west along south boundary
 of N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 9—100.00 chains.
 Thence W. along S. boundary of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ Sec. 9—10
 chains to S. W. corner of claim—a monument of stones. Thence
 north along west boundary of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 9—10.00
 chains to place of beginning. Comprising the N. E. $\frac{1}{4}$ of the S. W.
 $\frac{1}{4}$ and that portion of Lot No. 3 being fractional N. W. $\frac{1}{4}$ of N. W.
 $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 9 Tp. 29, S. R. 4 east, containing 19 12-100
 acres, more or less. This notice is posted at N. W. corner of claim,
 whence the S. W. corner of original location bears S. 40 deg. E. 60
 fks. distant and N. W. corner of original location bears N. 2 deg. west
 10.20 chains distant.

"Lynch Mining Claim," described as follows:

Beginning at quarter section corner between sections 9 and 16
 Tp. 29 S. R. 4 east, the southwest corner of claim monument of
 stone, thence north 20.00 chains to N. W. corner identical with N.
 W. corner of Lot No. 4 monument of stone. Thence east on north
 boundary of Lot No. 4—10.00 chains to N. E. corner monument of
 stone. Thence S. 20.00 chains to line between sections 9 and 16
 the southeast corner monument of stone where this notice is posted.
 Thence west along Section line 10.00 chains to southwest corner, the
 place of beginning, being the portion of Lot No. 4 corresponding to
 the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 9 Tp. 29 S. R. 4
 east. Containing 20 acres.

233 "Tip Top Mining Claim," described as follows:

Beginning at a monument of stone the S. E. corner of
 claim identical with the N. E. corner of the N. W. quarter of N. E.
 1-4 of Sec. 16 Tp. 29 S. R. 4 east. Thence north 20.00 chains to
 the N. E. corner—a monument of stone—identical with the N. E.
 corner of that portion of Lot No. 4 corresponding to the S. W. 1-4
 of S. E. 1-4 of Sec. 9. Thence west 10.00 chains to the N. W.
 corner of claim—a monument of stone. Thence south 20.00 chains

to the S. W. corner of claim—a monument of stone, where this notice is posted. Thence east along Section line between 9 and 16 10.00 chains to place of beginning, containing 20 acres being that portion of Lot No. 4 Sec. 9 Tp. 29 S. R. 4 east corresponding to east 1-2 of S. W. 1-4 of Sec. 9 Tp. 29 S. R. 4 east.

“Aurora Mining Claim,” described as follows:

Beginning at the N. E. corner of the N. W. 1-4 of the N. E. 1-4 of Sec. 16 Tp. 29 S. R. 4 east, being the S. W. corner of claim, monument of stone, where this notice is posted. Thence north 20.00 chains to north boundary of Lot No. 4 Sec. 9 the N. W. corner of claim monument of stone. Thence east 1,500 chains to right bank of Rio Grande, northeast corner of claim a post. Thence southerly with meander of right bank of Rio Grande along east boundary of Lot No. 4 Sec. 9 to meander corner on right bank of Rio Grande between sections 9 and 16, the southeast corner, a post. Thence west along section line 11 25/100 chains to S. W. corner, place of beginning. Containing 18 60/100 acres, being that portion of Lot No. 4 lying bet. the east boundary of that portion of Lot No. 4 corresponding to the S. W. 1-4 of S. E. 1-4 of Section 9 Tp. 29 S. R. 4 east and the Rio Grande.

234 And Afterwards, on to-wit, *on* the forty-eighth day of the said regular term, the same being Saturday December 23. A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1403.

JOHN H. MCKNIGHT, Appellee.

vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Appeal from District Court, Dona Ana County.

Now comes John Franklin, Esq., attorney for appellant herein, and moves the Court to fix the amount of the Supersedeas bond herein on appeal to the Supreme Court of the United States, and the Court being sufficiently advised in the premises, grants the motion and fixes the bond at the sum of \$15,000.00.

It is therefore considered and adjudged by the Court that the Supersedeas bond herein on appeal to the Supreme Court of the United States be, and the same hereby is fixed at the sum of \$15,000.00 condition as provided by law and to be approved by one of the judges of this Court.

And Afterwards, on to-wit, *on* the second day of January, A. D. 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for rehearing in the above entitled cause, which said motion for rehearing was and is in the following words and figures, to-wit:

235 In the Supreme Court of the Territory of New Mexico.

No. —.

JOHN H. MCKNIGHT, Appellee,
vs.
EL PASO BRICK COMPANY, Appellant.

Motion for Rehearing.

Now comes the appellant in the above styled and numbered cause, and moves the court to set aside and vacate the judgment heretofore rendered herein affirming the judgment of the district court, and grant it a rehearing, and for grounds of such said motion, says:

That this court erred in overruling each and everyone of the assignments of error made by appellant.

(Signed)

HAWKINS & FRANKLIN,

Attorneys for Appellant.

And Afterwards, on to-wit, on the fiftieth day of the said regular term, the same being Tuesday January 2, A. D. 1912, the following amongst other proceedings were had and entered of record, to-wit:

No. 1403.

JOHN H. MCKNIGHT, Appellee,
vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Appeal from District Court, Dona Ana County.

This cause coming on before the Court upon the motion of appellant for rehearing herein and the Court having had the said motion under advisement, denies the same.

236 It is therefore considered and adjudged by the Court that the motion of appellant for rehearing be, and the same hereby is denied.

And Afterwards, on to-wit, on the said fiftieth day of the said regular term, the same being Tuesday January 2, A. D. 1912, the following amongst other proceedings were had and entered of record, to-wit:

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Appeal from District Court Dona Ana County.

This cause coming on before the Court upon the motion of appellant for statement of facts herein in the nature of a special ver-

dict, and the Court having had said motion under advisement and being now sufficiently advised in the premises, grants the said motion and makes the findings of fact of this Court, the findings of fact signed by the Chief Justice and filed in the office of the Clerk of this Court.

It is therefore considered and adjudged by the Court that the motion for statement of facts herein in the nature of a special verdict on appeal to the Supreme Court of the United States as the same has been signed by the Chief Justice of this Court and duly filed in the office of the Clerk of this Court be, and the same hereby is made the statement of facts of this Court in the nature of a special verdict.

And Afterwards, on to-wit, on the second day of January, A. D. 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, the findings of fact made
237 by the Court, which said findings of fact made by the Court were, and are in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

No. —.

JOHN H. MCKNIGHT, Appellee,

v.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Findings of Fact Made by the Court.

And now this cause coming on to be heard on the application of the appellant, El Paso Brick Company, requesting this court to make findings of fact for use on appeal from the judgment of this court to the Supreme Court of the United States, the court makes for such purpose the following findings of fact, to-wit:

I.

On the 15th day of December, 1900, E. Hewitt Rodgers, Edward Rodgers, Eb. Rodgers, W. F. Robinson, B. Leibman, H. B. Ross, W. J. Harris and James H. White did locate upon the unsurveyed public domain, in the County of Dona Ana, Territory of New Mexico, a certain placer mining claim, containing about 160 acres; that the said claims was named the "Aluminum" placer claim; and that the said persons did discover valuable mineral deposits within the boundaries thereof and did and performed all the various acts and things required by the laws of the United States and the Territory of New Mexico, and the legal rules and customs of miners applicable to the location upon the public domain of the United
238 States of placer mining claims, and they did on the 10th day of January, 1901, cause the notice of location of said claim to be recorded in the office of the Recorder of the County of Dona Ana.

II.

That on or about the 31st day of March, 1902, E. Hewitt Rodgers, Edward Rodgers, A. F. Rodgers, Eb. Rodgers, E. S. Lemen, H. G. Ross, W. F. Robinson and James H. White did locate upon the unsurveyed public domain in the County of Dona Ana, Territory of New Mexico, a certain placer mining claim, containing about 160 acres; that the said claim was named the "Hortense" placer claim, and that the said persons did discover valuable mineral deposits within the boundaries thereof, and did and performed all the various acts and things required by the laws of the United States and the Territory of New Mexico, and legal rules and customs of miners applicable to the location upon the public domain of the United States of placer mining claims, and did on the 30th day of April, 1902, cause the notice of location of said claims to be recorded in the office of the Recorder of the County of Dona Ana.

III.

That the Appellant is a corporation organized under the laws of the state of Texas, and prior to the 5th day of December, 1900, by itself or its predecessors in interest, was in the possession and control of a certain placer mining claim, named the "International," which adjoined and was contiguous to the territory embraced in the said Hortense and Aluminum claims; that there existed upon the said International claim a large deposit of red shale; and that the appellant prior to the said last mentioned date, had constructed a plant for the manufacture of brick out of the said red shale and was engaged in the manufacture thereof out of the red shale in the said International claim.

239

IV.

That after the location of the said two claims, the respective locators thereof, conveyed the same by divers mesne conveyances to the appellant, without receiving any consideration therefor.

V.

That neither the locators of the said Hortense or Aluminum claims, or either of the said claims, or any of said locators, or the said appellant, or its predecessors in interest, did or performed, or caused to be done or performed the annual labor or improvements required by law upon or for either of the said claims for or during the year 1904 or for or during the year 1905.

VI.

That on or about the first day of April, 1905, the appellee, being then a citizen of the United States, located upon the public domain of the United States open to mineral entry, and upon the territory embraced within the said Hortense and Aluminum claims, two certain mining claims, named respectively the "Lulu" and the "Agnes;"

and that the appellee, prior to said location, did discover upon each of the said two claims valuable mineral deposits; and that the appellee did each and every act required to be done and performed by the laws of the United States, the Territory of New Mexico, and the rules and regulations prevailing in the said district applicable to the location of placer mining claims, and did, on the 11th day of April, 1905, cause to be recorded in the office of the County Recorder of Dona Ana County a certificate of the notice of location of each of the said placer mining claims which said notices of location were in the words and figures following,

240

"Lulu" Placer Mining Claim.

Notice is hereby given to all to whom it may concern, that, I, J. H. McKnight, Citizen of the United States, over the age of twenty one years, have located, and by these presents do locate twenty acres of placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the County of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stones situated on the North line of the Southern Pacific Railroad about one hundred feet north of said railroad yard limit post running thence Easterly along north line of said Railroad, thirteen hundred and twenty (1320) feet to a monument of stone, thence northerly ix hundred and sixty feet (660) to a monument of stone, thence westerly parallel with south line Thirteen hundred twenty feet to a monument of stone thence southerly six hundred sixty feet (660) to a monument of stone and place of beginning.

Said land and claim to be known as the Lulu Placer Mining Claim.

Dated on the ground the 7th day of April 1905.

J. H. MCKNIGHT, *Locator.*

Witness:

T. L. MYERS.

"Agnes" Placer Mining Claim.

Notice is hereby given, to all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of Placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico. Said

241 land and claim lies and is situated in — Mining District in the county of Dona Ana, Territory of N. M., and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stone situated on the south line of the Southern Pacific Railroad about two hundred feet easterly of said Railroad yard limit post, running thence easterly along the south line of said R. R. Six hundred and sixty feet (660) to a monument of stone, thence southeasterly along south line of said R. R. Thirteen hundred and twenty feet (1320) to a monument of

stone, thence southwesterly parallel with westerly line * * * thence northwesterly * * * Thirteen hundred and twenty feet (1320) to the place of beginning.

Said land and claim to be known as the Agnes Placer Mining Claim.

Dated on the ground this 7th day of April, 1905.

J. H. McKNIGHT, *Locator*.

Witness:

T. L. MYERS.

"Lulu" Placer Mining Claim.

Notice is hereby given to all to whom it may concern, that I, J. H. McKnight, Citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of placer mining land in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the county of Dona Ana, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Beginning at a monument of stones situated on the North line of the Southern Pacific Railroad about one hundred feet north of said railroad yard limit post running thence Easterly along north line of said Railroad, thirteen hundred and twenty (1320) 212 feet to a monument of stone, thence northerly six hundred and sixty feet (660) to a monument of stone, thence westerly parallel with south line Thirteen hundred twenty feet to a monument of stone, thence southerly six hundred sixty feet (660) to a monument of stone and place of beginning.

Said land and claim to be known as the Lulu Placer Mining Claim.

Dated on the ground this 7th day of April, 1905.

J. H. McKNIGHT, *Locator*.

Witness:

T. L. MYERS.

"Agnes" Placer Mining Claim.

Notice is hereby given, to all whom it may concern, that I, J. H. McKnight, citizen of the United States, over the age of twenty-one years, have located, and by these presents do locate twenty acres of Placer mining land, in accordance with the mining laws of the United States and of the Territory of New Mexico. Said land and claim lies and is situated in — Mining District in the county of Dona Ana, Territory of N. M. and is more particularly bounded and described as follows towit:

Beginning at a monument of stone situated on the south line of the Southern Pacific Railroad about two hundred feet easterly of said Railroad yard limit post, running thence easterly along the south line of said R. R. Six hundred and sixty feet (660) to a monument of stone, thence southeasterly along south line of said R. R. Thirteen hundred and twenty feet (1320) to a monument of stone,

thence southwesterly parallel with westerly line, * * * thence northwesterly * * * Thirteen hundred and twenty feet (1320) to the place of beginning.

Said land and claim to be known as the Agnes Placer Mining Claim.

243 Date- on the ground this 7th day of April, 1905.

J. H. McKNIGHT, *Locator*.

Witness:

T. L. MYERS.

VII.

That at the time of the location of the said "Lulu" and "Agnes" claims there was only one Southern Pacific railroad yard limit post in the County of Dona Ana, New Mexico, and that the said yard limit post was in the vicinity of the said claims, and that the description of the said claims in the said notices of location was sufficiently definite to enable anyone to identify the said claims upon the ground.

VIII.

That thereafter, on the 2nd day of August, 1905, the appellant made application to the Land Office in the town of Las Cruces for patent for certain mining claims described as the "Aluminum group," and consisting of the said International placer mining claim, and the Hortense and Aluminum placer claims, which application was based upon, and conformed in shape, so far as the said Hortense and Aluminum claims were concerned to the original location notices of the said claims; and that the appellant accompanied said application with various proofs necessary to be considered by the Land Office, with reference to such application; that the said application for patent was verified by but one person, to-wit: the attorney-in-fact for the appellant; that the proof of posting the notice of defendant's intention to apply for patent, together with a copy of the plat, consisted of the affidavit of two persons which said affidavit was executed before a Notary Public in the State of Texas; that subsequent to the filing of such application for patent, publication of notice thereof was made, and subsequent thereto and payment was made by the appellant to the proper

244 official of the Land Office of the amount required by the United States in the purchase of the two claims, according to the acreage involved in the claims; and that on the 23rd day of October, 1905, the Receiver of the Land Office issued to the appellant a final receipt for the amount of such payment due for such claim and so paid.

That subsequent to the issue of such receipt, the entry covered thereby, was, upon due notice to the applicant, considered by the Commissioner of the Land Office upon his own initiative, and upon various protests presented against the allowance of the same, and said Commissioner, on the Fourth day of September, 1906, upon full hearing, rendered his decision, cancelling such entry.

That thereupon an appeal by the appellant from the decision of the Commissioner was taken to the Honorable, The Secretary

of the Interior, who, after considering such appeal, did on the 9th day of September, 1908, render his decision cancelling such entry.

That the decision of the said Secretary of the Interior was in the words and figures following, to-wit:

E. B. C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, Sep. 9, 1908.

L. L. B.
36-218.
D-320.

No. 719. "N."

Ex Parte EL PASO BRICK CO.

Appeal Las Cruces, M. E.

The Commissioner of the General Land Office.

SIR: The El Paso Brick Company, a corporation, has
245 appealed from your office decision of September 4, 1906, which held for cancellation the company's entry No. 719, made October 23, 1905, for the International, Aluminum and Horse-tense placer mining claims, constituting the Aluminum placer group, survey No. 1162, Las Cruces, New Mexico, land district, for the reason that the affidavit of posting of the plat and notice on the land was subscribed and sworn to before a notary public in and for the County of El Paso, State of Texas, and not before an officer authorized to administer oaths within the land district where the claims are situated, as required by section 2325 of the Revised Statutes.

August 2, 1905, the company filed, with other documents, its application for patent, duly verified on the preceding day before the Register of the local land office by its authorized attorney in fact, wherein, among other things, he avers:

That he posted in a conspicuous place on said lands his notice of intention to apply for patent, together with a copy of aforesaid plat on the 10th day of June, 1904, which said notice and plat is now so posted on said lands, and that a copy of said notice, together with the proof of posting same attached thereto, is filed herewith. The proof of posting referred to consists of the affidavit of two persons, as having been present on June 10, 1904, when the plat and notice were posted upon the claims in a conspicuous place, which is described with definiteness and particularity, but such affidavit was executed before a notary public in the State of Texas, as above stated.

The plat and notice remained posted until October 20, 1905. Publication began August 11, 1905, and was continued for the full period of sixty days, concurrently with posting upon the land and in the local office.

By decision of April 10, 1906, your office found the entry to be
246 defective in the following particulars, namely: that no sworn statement as to fees and charges had been filed; that no evidence as to whether the claims contained known veins or
19-542

lode was furnished; that the affidavits as to posting and continuous posting were not executed within the land district; that the Hortense claim appeared to contain an excess in area; that the full title to the Aluminum claim was not shown to be in the company; that the requisite improvements were not shown; that the mineral character of the land did not satisfactorily appear; and that the Aluminum and Hortense claims were irregular in shape and no sufficient reason was shown for the failure to conform them as near as practicable with the United States system of public land surveys. The company was granted sixty days in which to show cause why the entry should not be cancelled. In response numerous affidavits and exhibits, designed to overcome the above objections, were filed on behalf of the company, and among them, certain affidavits executed before a Notary Public within the land district, showing the fact of the reasonable posting on the land.

September 4, 1906, your office considered the showing submitted, and stated that it appeared to be necessary to discuss but one feature of the cause in order to show that the entry was fatally defective, namely, the original affidavit as to posting. Finding that that affidavit was not executed as required by the statute, and citing as authorities the cases of *Mattes v. Treasury, etc., Co.*, (34 L. D. 314) and *Frazier Borate Mining Co. v. Calm* (departmental decision of March 17, 1905, unreported) your office concluded that the entry must be held for cancellation.

The pending appeal followed.

The appellant company has assigned a number of specifications of error. Additional affidavits and exhibits have been filed
247 by the company for the purpose of sustaining the entry, and exhaustive printed briefs and arguments have been submitted by counsel.

Certain persons asserting claims to portions of the land have filed protests against the entry, and on their behalf there have been presented extensive arguments and counter-affidavits designed to support the decisions of your office. Up to the present time, however, the case has been an *ex parte* proceeding.

It is not necessary and would serve no useful purpose at this time, to enter into details as to the discussion presented by the respective counsel, which covers a wide range. Suffice it to state that the appellant company earnestly contends, in effect, that the defect as to the affidavit of posting upon the claims is not fatal to the entry under the circumstances of this case and does not go to the jurisdiction of the land department to entertain the present patent proceedings. In other words, it is argued that the provision of the statute, as to the filing of the affidavit of two witnesses showing the posting upon the land, is not mandatory but directory; that the jurisdiction of the local officers attaches by virtue of the fact of posting, which is not questioned here, and not by reason of the filing of the proof of such fact in the precise form directed by the statute, provided the fact of posting clearly appears otherwise, as it is claimed that it did in this case by the allegations contained in the patent application.

The following provisions of the Revised Statutes are pertinent to this case:

SEC. 2325. * * * Any person, association or corporation * * * who has, or have, complied with the terms of this chapter for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common * * * and shall post a copy of such plat, together with a notice of such application for patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application plat, field notes, notices and affidavits, shall publish a notice that such application has been made for the period of sixty days, in a newspaper to be by him designated as published nearest to such claims, and he shall also post such notice in his office for the same period.

SECTION 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office.

With the contention of the company the Department is unable to agree. The allegations of the application are verified by but one person, while the statute required "an affidavit of at least two persons." Section 2325, supra. And the Department has heretofore held these particular provisions of the statute are mandatory. In the case of Mojave Mining and Milling Co. vs. Karma Milling Co. (34 L. D. 583-6) in which the affidavit of posting contained no statement that the plat of the claim was posted or in any manner mentioned or referred to it, the following language was used:

The statutory requirement that the fact of posting shall be shown by an affidavit of at least two persons is mandatory, and one against which the land department is without authority to grant relief. Until such affidavit is filed, the register is without authority to proceed upon the application, and should not attempt to do so in any case. As the required affidavit was not filed in this case, the proceedings upon the application for patent were without authority of law. In this particular the terms of the statute were not complied with and there is therefore no assumption that the applicant company is entitled to a patent and that no advance claim exists. Such being the state of the record, the patent proceedings must fall, and it is not material to inquire whether the plat and notice were in fact posted as required or not. The entry will be cancelled, but without prejudice to the renewal of patent proceedings should the applicant company so desire.

In case of Frazier Borate Mining Co. vs. Calm (unreported departmental decision of June 15, 1905,) on review, where the question involved was the verification of an application for patent and an affidavit of posting, in each case outside of the land district, the

Department held as follows, the quotation also appearing in the case of Milford Metal Mines Investment Co. (45 L. D. 174, 175):

Neither section 2335 of the Revised Statutes, nor any other provision of the mining laws, authorizes the verification of applications for patent or affidavits such as here involved otherwise than before an officer authorized to administer oaths within the land district where the claim is situated. The attempted verification of the application and affidavit in question before an officer acting without authority under the law, was of no more legal effect than if no attempt at verification had been made; and the notice published by the register based upon such application and affidavit, being without legal foundation, was fatally defective. The case was therefore not one of mere irregularity, or one which presented defects
250 that might be cured by supplemental proceedings. The notice being invalid, the entry cannot stand. (*Southern Cross Gold Mining Company vs. Sexton, et al.*, 31 L. D. 415.)

Having under consideration the verification of an adverse claim, the department, in the case of *Mattes v. Treasury, etc., Co.* on review (34 L. D. 314), held as follows (Syllabus):

"All affidavits under the mining laws are required to be verified in accordance with the provisions of section 2335 of the Revised Statutes except where authority for their execution is otherwise specifically given by statute."

The foregoing views of the Department are in harmony with, and are re-enforced by, other cases in which a similar principle has been involved. In the case of *Rico Lode* (S. L. D. 223), the entry was held to be invalid because the application, as well as all other papers except the proof of continuous posting, was verified by the attorney in fact, while the applicants themselves were residents of, and were within, the land district at the time the application was made. In the case of *Crosby and other Lode claims* (35 L. D. 434) the application for patent was held to be a nullity because verified by an agent, the applicants being residents of the land district, and it not being shown that at the time the application was made they were in fact not within the same; and a request that the case be submitted for equitable consideration and action under sections 2450 and 2457 inclusive, of the Revised Statutes, was denied. The application for patent in the case of *North Clyde Quartz Mining Claim and Millside* (35 L. D. 455), was held to be *bad* because verified outside of the land district. In each of these cases the proceedings were held to be invalid and the entry order cancelled.

In view of the foregoing it must be held that the affidavit of posting here in question is fatally defective. The defect is not a mere irregularity which may be cured by the subsequent filing of a
251 properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been heretofore filed, the Register was without authority to direct the publication of the notice or otherwise proceed and the notice, although in fact published and posted, being without the necessary legal basis.

was a nullity and ineffectual for any purpose. The patent proceedings therefore fall and the entry will be cancelled.

The applicant company puts forward a further and alternative contention to the effect that, even though the entry should be considered defective, yet it should be submitted for equitable consideration under said sections 2450 and 2457 of the Revised Statutes. This disposition cannot be made of the case, for the reason that the record shows that there are alleged adverse claims, and for the further reason that, as was held in the case of Crosby and other Lode claims, supra, there has been no substantial compliance with the law, the entry and the proceedings upon which it is based being wholly invalid.

In as much as the conclusion reached above effectually disposed of the present entry, it is unnecessary to discuss the other questions raised by counsel in the argument.

It should be pointed out, however, that from the record, before the department, it appears that three homestead entries (Nos. 4723 — and 4931, Las Cruces series) were inadvertently allowed of record in the year following the making of the mineral entry, each one in part in conflict therewith. One of these entries (No. 4724), was the second homestead filing and was allowed by the local officers in the absence of the authorization of your office and of the necessary showing required in cases of second entries. Also against this entry two corroborated protests have been filed, charging the mineral character of portions of the land covered thereby. In this connection

252 attention is directed to the allegations of the numerous affidavits filed on behalf of the company tending to establish the mineral character of the land embraced within its three placer mining claims. These matters should receive due consideration and your office will take such action and give such instructions to the local officers as the premises may warrant.

The decision appealed from is accordingly affirmed and the papers are herewith returned.

Very respectfully,
(Signed)

FRANK PIERCE,
First Assistant Secretary.

That thereafter and on the 24th day of November, 1908, the appellant waived before the Honorable Secretary its right to make a review of such decision, and thereupon such decision and the cancellation of said entry became final, and said entry was cancelled on the records of the land office. That afterwards and while the said proceedings were pending before the commissioner of the General Land Office, and on the — day of —, 1907, the appellant caused to be made a supplementary affidavit with reference to such posting and such claim which said affidavit was in compliance with the laws of the United States and was verified before a proper officer in the County of Dona Ana, Territory of New Mexico.

IX.

That on the — day of May, 1906, the appellee being then a citizen of the United States, and the owner of the said Lulu and Agnes claims, located as aforesaid, did re-locate the said territory embraced within the said Lulu and Agnes claims, and did locate other
 253 territory adjacent and contiguous thereto, which said territory so relocated and located, was covered by five placer mining claims, so located by the appellee, named respectively, the "Lulu," the "Agnes," the "Lynch," the "Tip Top" and the "Aurora," which said five certain claims are described respectively:

The "Agnes" claim described as follows:

Beginning at the S. W. corner of claim identical with the S. W. corner of lot No. 3 Section 9 Tp. 29 S. R. 4 east—A monument of stones, where notice is posted, whence the S. W. corner of the original location bears S. 6 deg. West 5.00 chains distant. Thence East on the south boundary of Sec. 9 20.00 chains to the N. E. corner of the S. W. quarter of S. E. quarter of Sec. 9 the S. E. corner of claim monument of stone. Thence north to right bank of Rio Grande a "stake." Thence meander of Rio Grande north westerly to intersection with the south boundary of N. half of fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 the N. E. corner of a claim post. Thence westerly along south boundary of N. half of S. E. quarter Sec. 9 17 28-100 chains to the west boundary of lot No. 3 Sec. 9 of the N. W. corner of claim, monument of stones; whence the N. W. corner of original claim bears N. 36 deg. west 8.70 chains distant. Thence south 10.00 chains to the place of beginning, containing 18½ acres, more or less, being that part of lot No. 3 Sec. 9 corresponding to fractional S. half of the N. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east.

The "Lulu" claim described as follows:

Beginning at the northwest corner of the N. E. quarter of N. E. quarter of S. W. quarter of Section 9 Tp. 29 S. R. 4 east N. M. P. M. a monument of stone. Thence east 18 25-100 chains, to right bank of Rio Grande a post, the N. E. corner. Thence S. E.-ly with meander of Rio Grande to North intersection of dividing line bet.
 254 the E. and W. half of the N. W. quarter of the S. E. quarter of Sec. 9 a post. Thence south along said dividing line bet. east and west halves of the N. W. quarter of the S. E. quarter of Sec. 9 to S. E. corner of N. W. quarter of N. W. 4 S. E. quarter of Sec. 9, the S. E. corner of claim—a monument of stones. Thence west along south boundary of N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 10.00 chs. Thence W. along S. boundary of N. E. quarter N. E. quarter S. W. quarter Sec. 9 10 chs. to S. W. cor. of claim a monument of stones. Thence north along west boundary of N. E. quarter of N. E. quarter of Sec. 9 10.00 chs. to place of beginning. Comprising the N. E. quarter of the S. W. quarter and that portion of lot 3 being fractional N. W. quarter of N. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S. R. 4 east, containing 19 12-100 acres more or less. This notice is posted at N. W. corner of claim, whence the S. W. corner of the original location bears S. 40 deg. E.

60 lks. distant, and N. W. cor. of original location bears N. 2 deg. west 10.20 chains distant.

The "Lynch" claim described as follows:

Beginning at quarter section corner between sections 9 and 16 Tp. 29 S. R. 4 east, the south west corner of claim monument of stones. Thence north 20.00 chs. to N. W. cor. identical with N. W. corner of Lot 4, monument of stones. Thence east on north boundary of lot No. 4-10.00 chs. to N. E. cor. monument of stones. Thence south 20.00 chs. to line bet. sections 9 and 16 the south east corner, a monument of stones where this notice is posted. Thence west along Section line 10.00 chs. to southwest corner the place of beginning, being that portion of lot No. 4 corresponding to the W. half of the S. W. quarter of S. E. quarter of Section 9 Tp. 29 S. R. 4 east. Containing 20 acres.

The "Tip top" claim described as follows:

255 Beginning at a monument of stones the S. E. cor. of claim identical with the N. E. cor. of N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 S. R. 4 east. Thence north 20.00 chs. to the N. E. corner, a monument of stones, identical with the N. E. cor. of that portion of lot No. 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9. Thence west 10.00 chs. to the N. W. cor. of claim, a monument of stone. Thence south 20.00 chs. to the S. W. cor. of claim, a monument of stones, where this notice is posted. Thence east along section line between 9 and 16, 1.00 chs. to place of beginning, containing 20 acres being that portion of Lot No. 4 of Sec. 9 Tp. 29 S. R. 4 east corresponding to east half of S. W. quarter of Sec. 9 Tp. 29 S. Range 4 east.

The "Aurora" claim described as follows:

Beginning at the N. E. corner of the N. W. quarter of the N. E. quarter of Sec. 16 Tp. 29 South R. 4 East, being the S. W. corner of claim, monument of stone, where this notice is posted. Thence north 20.00 chs. to north boundary of lot No. 4 Sec. 9 the N. W. corner of claim monument of stone. Thence East 15.00 chs. to right bank of Rio Grande, North East corner of claim a post. Thence Southerly with meander of right bank of Rio Grande along east boundary of lot No. 4 Sec. 9 to meander corner on right bank of Rio Grande Bet. Sections 9 and 16, the South East corner a post. Thence west along Section line 11 25-100 chs. to the S. W. corner place of beginning. Containing 18 60-100 acres, being that portion of lot No. 4 lying bet. the East boundary of that portion of lot 4 corresponding to the S. W. quarter of S. E. quarter of Sec. 9 Tp. 29 S., R. 4 East and the Rio Grande.

256 That in locating each of the said five claims, the appellee did and performed each and every act required to be done and performed by the laws of the United States, the Territory of New Mexico, and the rules and regulations prevailing in said district, applicable to the location of placer mining claims, and that the appellee before making said locations, did discover valuable mineral deposits upon each of the said five claims, and did cause a notice of location of each of them to be recorded on the — day of May, 1906, in the office of the Recorder of the County of Dona Ana.

X.

That the appellee did during the year 1906, cause to be performed upon each of the said Lulu and Agnes claims, work and improvements of the value of One Hundred Dollars each, and that in the year 1907, the appellee did cause to be performed upon or for the improvement and development of each of the said five claims, to-wit, the Lulu, the Agnes, the Lynch, the Tip Top and the Aurora, work and improvements of the value of One Hundred Dollars each; and in the year 1908, the appellee did cause to be performed upon or for the improvement and development of each of the said five claims, to-wit, the Lulu, the Agnes the Lynch, the Tip Top and the Aurora, work and improvements of the value of One Hundred Dollars each.

XI.

That on or about the first day of September, 1908, the appellee resumed assessment work upon the said five claims, the Lulu, the Agnes, the Lynch, the Tip Top and The Aurora, for the year 1908, and continued to do said assessment work upon or for the benefit and improvement of the said claims until the appellant undertook to relocate the said Hortense and Aluminum claims as hereinafter found, and that the appellee was actually doing said work upon or
257 for the benefit or improvement of the said claims at the time when the appellant so undertook to relocate the said claims.

XII.

That on or about the 11th day of September, 1908, the appellant relocated the territory embraced within the said Hortense and Aluminum claims, the said territory being then a part of the territory covered by the said five claims so located as aforesaid by the appellee, and did do and perform each and every act required by the laws of the United States, the Territory of New Mexico, and the rules and regulations of miners in said district with respect to the location of placer mining claims and did cause the notice of location to be filed on the — day of September, 1908, in the office of the Recorder of the County of Dona Ana, copies of said notices of location being attached to appellant's answer herein.

XIII.

That on or about the 25th day of November, 1908, the appellant filed in the United States Land Office at Las Cruces, New Mexico, an application for United States mineral patent for the Aluminum group of placer mining claims, so-called, consisting of the International and the said Hortense and Aluminum placer claims as relocated on the 11th day of September 1908, as hereinbefore found, and caused the Register of said Land Office to give notice of said application for patent by publication as required by law; that in and by said application for patent, the appellant set up and alleged that it was the owner and in possession of the said group of placer mining claims which included the tracts of land and premises cov-

ered by the said Lulu, Agnes, Lynch, Tip Top and Aurora claims and hereinbefore in finding No. IX described.

XIV.

That the appellee on the 30th day of December, 1908, filed in the said office, under oath, a protest and adverse claim against said application of appellant, and for said premises in said finding No. IX described, in due form, and showing the nature, extent and boundaries of the adverse claim of the appellee; and that thereupon further proceedings on said application in said Land Office were stayed, to await the determination by a court of competent jurisdiction, of the right of possession of the said premises in said finding No. IX described, and the rights of the respective parties therein and thereto; and that to that end, the plaintiff within thirty days after the filing of said protest and adverse claim, did bring and institute this suit.

XV.

That there has been no evidence introduced in this case to show whether or not the appellant had resumed labor upon its Aluminum and Hortense mining claims, respectively before the appellee made, or attempted to make locations of said Lulu and Agnes Mining Claims.

XVI.

That on the 2nd day of August, 1905, the appellant filed in the land office at Las Cruces, New Mexico, its application for patent for a group of mining claims, including said Hortense and Aluminum claims, and accompanied the same with the proofs usually required with reference thereto, except that the affidavit of posting the claim, with notice of application for patent, had been sworn to before a Botary Public in the County of El Paso, State of Texas, and not within the Land District in which such claims were situated, as required by law. That upon the filing of such application the Register and Receiver caused publication to be made of the pendency of such application and on the 23rd day of October, 1905, no adverse claims having been filed by any other person, the said Register and

Receiver accepted payment in full from the said defendant at the rate required by law for the purchase from the United States of placer mining claims and thereupon issued to the said appellant the final receipts for the money so paid, and the entry of such lands in the name and for the benefit of the said appellant was thereupon placed upon the records of such Receiver and Register as having been duly perfected and made.

XVII.

There is no evidence introduced to show whether at the time of the location of said Tip Top, Aurora and Lynch mining claims and the re-location of said Lulu and Agnes mining claims by the appel-

lee aforesaid in the year 1906, the appellant had resumed work upon the ground embraced in such claims or either thereof.

XVIII.

That on the — day of September, 1908, and subsequent to the decision of the Secretary of the Interior or cancelling such final receipt and entry of such Hortense and Aluminum placer mining claims, and the waiver of appellant of any right to move for review of such decision, the appellant made amendatory locations in accordance with law of substantially the same ground embraced in said Hortense and Aluminum mining claims and embracing all of the ground contained within the Lynch, Tip Top, Aurora, Lulu and Agnes mining claims, claimed by appellee upon which mineral has ever been discovered by appellee previous to location and amendatory location thereof.

XIX.

The court finds that the value of the matter in dispute in this cause, exclusive of costs, exceeds the sum of five thousand dollars (\$5,000).

(Signed)

WILLIAM H. POPE,
Chief Justice.

O. K.

MERRITT C. MECHEM.

260 And Afterwards, on to-wit, on the second day of January,

A. D. 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for appeal and to fix the Supersedeas bond herein by appellant, which said motion was, and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

No. —.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, Appellant.

Motion for an Appeal and to Fix Supersedeas Bond.

Now comes the El Paso Brick Company, appellant, and states to the court that it is aggrieved by the judgment of the court rendered herein and affirming the judgment rendered by the district court in this case and moves the court to make a finding of facts for use on appeal therefrom to the United States Supreme Court and to grant it an appeal from the judgment of this court to the Supreme Court of the United States, and to fix the amount of the supersedeas bond on said appeal, and appellant will ever pray.

(Signed)

HAWKINS & FRANKLIN,
Attorneys for Appellant.

And Afterwards, on to-wit, *on* the fiftieth day of said regular term, the same being Tuesday the second day of January, A. D. 1912, the following amongst other proceedings were had and entered of record, to-wit:

261

No. 1403.

JOHN H. MCKNIGHT, Appellee,
vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Appeal from District Court, Dona Ana County.

And now, on this day, came the Appellant, El Paso Brick Company, *but* its Attorneys of record, Hawkins and Franklin, and prayed an appeal from the judgment and decision of this court, in this cause, to the Supreme Court of the United States, and move the court to fix the amount of the supersedeas bond upon such appeal. All parties being before the court and after considering said prayer and motion, the court doth sustain the same.

It is, therefore, considered, ordered and adjudged by the court that the Appellant, El Paso Brick Company, be, and it is hereby granted an appeal from the judgment and decision of this court to the Supreme Court of the United States.

It is further ordered, adjudged and decreed by the court that the amount of the supersedeas bond in this cause be fixed at the sum of Fifteen thousand (\$15,000.00) Dollars.

And Afterwards, on to-wit, *on* the second day of January, A. D. 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a supersedeas bond in the above entitled cause, which said supersedeas bond was, and is in the following words and figures, to wit:

In the Supreme Court of the Territory of New Mexico, Dona Ana County, New Mexico.

262

No. —.

JOHN H. MCKNIGHT, Appellee,
v.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Supersedeas Bond.

Know all men by these presents that we, the undersigned El Paso Brick Company, Appellant, as principal, and The United States Fidelity & Guaranty Company of Baltimore, Maryland, as its surety are held and firmly bound unto John H. McKnight, Appellee, in the full sum of Fifteen thousand (\$15,000.00) Dollars to be paid

to the said John H. McKnight, and to his heirs, executors and administrators, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, personal representatives and successors, jointly and severally, by these presents.

Sealed with our *seals* and dated this 27th day of December, A. D. 1911.

The condition of the above obligation is such that whereas, lately, at the December A. D. 1911 term of the Supreme Court of the Territory of New Mexico, in a suit pending in said court between the Appellant, El Paso Brick Company, and the Appellee, John H. McKnight, judgment was rendered against the said Appellant, El Paso Brick Company, affirming the judgment of the District Court for the County of Dona Ana, New Mexico, and

Whereas, said Appellant, has obtained and taken an appeal from the said judgment of the Supreme Court of the Territory of New Mexico to the Supreme Court of the United States to reverse the judgment in the aforesaid suit and a citation directed to said plaintiff and appellee in said suit citing and admonishing him to be and appear in the Supreme Court of the United States in said cause sixty (60) days from and after the date of said citation has been issued,

now

263 The condition of the above obligation is such that if the said El Paso Brick Company shall prosecute said appeal to effect, and answer and pay all damages and costs, if it fails to make good its said plea and appeal, then the above obligation shall be void, otherwise to remain in full force and virtue.

[SEAL.] (Signed) EL PASO BRICK COMPANY.
By FRED J. WECKERLE, *President*,
[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By C. A. BISHOP AND
A. B. RENEHAN,
Its Attorneys in Fact.

Attest:

E. HEWITT RODGERS, *Secretary*.

STATE OF TEXAS,
County of El Paso, ss:

On this 27th day of December, A. D. 1911, before me appeared Fred J. Weckerle, to me personally known, who being by me duly sworn, did say that he is the president of the El Paso Brick Company, the corporation mentioned in the foregoing instrument and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Fred J. Weckerle acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto subscribed my name and

affixed my official seal, this the day and year in this certificate first above written.

[SEAL.]

GROVER C. SUGGO,
Notary Public in and for El Paso County, Texas.

My Commission Expires June 1st, 1913.

264 TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

On this 29th day of December A. D. 1911 before me personally appeared C. A. Bishop & A. B. Renahan to me known, who, being by me duly sworn did say that they are the Attorneys-in-fact for the United States Fidelity and Guaranty Company of Baltimore, Maryland, and that the seal affixed to the foregoing instrument is the corporate seal of the said corporation and that the said instrument was signed and sealed in behalf of the said corporation by authority of its Board of Directors, and the said C. A. Bishop & A. B. Renahan acknowledged said instrument to be the free act and deed of said corporation, The United States Fidelity and Guaranty Company of Baltimore, Maryland.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first above written.

[SEAL.]

STELLA V. CANNY,
Notary Public.

My commission expires April 19, 1913.

The foregoing bond is approved as to form and sufficiency.

(Signed)

WM. H. POPE,
Chief Justice.

And Afterwards, on to-wit, on the sixteenth day of January A. D. 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors by appellant on appeal to the Supreme Court of the United States, which said assignment of errors was, and is in the following words and figures, to-wit:

265 In the Supreme Court of New Mexico.

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, Appellant.

Appellant's Assignments of Error on Appeal to the Supreme Court of the United States.

Comes now the El Paso Brick Company, Appellant, in the above styled and numbered cause and alleges that the following manifest errors to its prejudice intervened in the trial and decision of the

above styled cause in the Supreme Court of New Mexico and assigns such errors for review and correction by the Supreme Court of the United States.

First. The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the trial court in such cause.

Second. The said court erred in not reversing said cause and rendering judgment in favor of the appellant.

Third. The said court erred in holding that the final receipts for the land embraced in the "Hortense," "Aluminum" and "International" Claims, issued by the Register and Receiver of the United States Land Office on August 2, 1905, and outstanding and uncanceled in May 1906, introduced in evidence, were void, nullities, and of no effect and did not have the effect of segregating the land embraced therein from the public domain so as to prevent the location of the same by the appellee.

Fourth. The said court erred in holding that the appellee could lawfully locate the premises in dispute while the entry made by appellant thereof remained of record and uncanceled previous to the decision of the Secretary of the Interior holding the same for cancellation.

Fifth. The final decision of the Secretary of the Interior referred to in the court's opinion having been only to the effect that the notice was void which had been previously given by publication of appellant's application for patent, and that, therefore, the entry must be cancelled, the Supreme Court erred in having considered and held that the same was a decision that the final receipt which had been issued to applicant based upon such entry was void, ab initio, instead of being voidable only.

Sixth. The said court erred in holding and considering that the entry which had been previously made for, and final receipt which had been issued to appellant for the premises, and which remained and was uncanceled and outstanding at the time of appellee's locations, and amended locations, was void at the time of appellee's said locations, and amended locations.

Seventh. The said court erred in holding that the decision of the Secretary of the Interior cancelling the entry made by appellant for patent was conclusive and binding upon the court in this cause on the issue as to whether or not the final receipts while outstanding segregated the land from the public domain so as to permit the location of the same by the appellee.

Eighth. The said court erred in holding that the appellant had the burden of proving that it had not resumed labor upon its "Hortense" and "Aluminum" Claims subsequent to the years in which it is alleged that it failed to perform the labor required thereon and before the appellee made his locations.

Ninth. The appellee having alleged and the proof having shown that he claimed the premises in dispute included in the original location of the "Lulu" and "Agnes" under re-locations made by him under a claim of right to forfeit valid locations previously made of the same premises by the appellant, it was incumbent upon the appellee to prove that the appellant had done none of the acts, by the doing of which under the law, it might

retain its rights and the appellee having alleged, but failed to show, that the appellant had not resumed labor upon its locations prior to the re-location of said premises by the original locations of the "Lulu" and "Agnes" by appellee, the Supreme Court erred in holding appellee's original locations of said "Lulu" and "Agnes" or either thereof, valid.

Tenth. The appellee having alleged and the proof having shown that he claimed the premises in dispute included in the amendatory locations of the "Lulu" and "Agnes," and the original locations of the "Lynch," "Tiptop" and "Aurora" under re-locations made by him under a claim of a right to forfeit valid locations previously made of the same premises by the appellant, it was incumbent upon the appellee to prove that the appellant had done none of the acts by the doing of which, under the law, it might retain its rights, and the appellee having alleged, but failed to show, that the appellant did not resume labor upon its locations prior to the making of such amendatory locations of said "Lulu" and "Agnes" and locations of said "Lynch," "Tiptop" and "Aurora" by appellee, the Supreme Court erred in holding appellee's amendatory locations of said "Lulu," and "Agnes," and original locations of said "Lynch," "Tiptop" and "Aurora," or any of the same, valid.

Eleventh. Said court erred in not holding that the affidavit made by W. F. Robinson, President of appellant, introduced in evidence by appellee and which showed that appellant had done the annual labor of One hundred (\$100.00) Dollars required by the Statutes of the United States on and for each of said "Hortense" and "Aluminum" Claims during and for the year 1904 was not evidence of the facts stated in such affidavit and particularly the fact that such work had been done.

268 Twelfth. The said court erred in not holding that the affidavit of W. F. Robinson, introduced in evidence by the appellee, and which showed that the appellant had done and performed the annual labor of One hundred (\$100.00) Dollars required by the Statutes of the United States to be done on mining claims each year, for and on both said "Hortense" and "Aluminum" Claims for and during the year 1904, said affidavit being the only evidence on that point, was not conclusive proof that appellant had done the annual labor aforesaid on and for each of said claims during and for the year 1904.

Thirteenth. The said court erred in finding that the land in controversy was at the time when appellee made its locations, and amended locations, upon the same, public domain of the United States subject to entry.

Respectfully submitted.

Attorneys for Appellant El Paso Brick Company.

269 And Afterwards, on to-wit, on the sixteenth day of January, A. D. 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a præcipe for record in the above entitled cause, which said præcipe was, and is in the following words and figures, to-wit:

In the Supreme Court of New Mexico.

No. 1403.

JOHN H. MCKNIGHT, Appellee,
vs.
EL PASO BRICK COMPANY, Appellant.

Præcipe for Record.

To the Clerk of the Above Styled Court:—

You are hereby requested by the Appellant, El Paso Brick Company, forthwith to prepare a transcript of all the following portions of the proceedings, records and files in the above styled cause, properly certifying thereto, to be used on appeal of the above styled cause from the judgment rendered in the above styled court to the Supreme Court of the United States, to-wit:

1. Complaint.
2. Answer.
3. Reply.
4. Waiver of Jury Trial in the Lower Court.
5. Findings requested by Defendant in Lower Court.
6. Findings requested by Plaintiff in Lower Court.
7. Findings, Conclusions and Judgment of the Lower Court.
8. Defendant's Motion to Vacate Judgment filed in the Court below.
9. Order of setting Aside and Modifying Judgment made by Lower Court.
- 270 10. Defendant's motion for Appeal in Lower Court.
11. Order allowing Appeal in Lower Court.
12. Appeal Bond in Lower Court.
13. Citation in Lower Court.
14. Præcipe for Record in Lower Court.
15. Opinion of Supreme Court.
16. Judgment of the Supreme Court.
17. Findings of Fact made by Supreme Court.
18. Assignments of Error filed in Supreme Court.
19. Motion for Appeal filed in the Supreme Court.
20. Order granting Appeal to United States Supreme Court.
21. Supersedeas Bond on Appeal to United States Supreme Court.
22. Citation from Supreme Court of the Territory.
23. Stipulation as to value of property in controversy filed in Supreme Court.
24. This Præcipe.

Respectfully,
(Signed)

HAWKINS & FRANKLIN,
Attorneys for Appellant.

And Heretofore, on to-wit, on the twenty-third day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the Court in

the above entitled cause, which said opinion by the Court was, and is in the following words and figures, to-wit:

271 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1403.

JOHN H. MCKNIGHT, Appellee,

vs.

EL PASO BRICK COMPANY, a Corporation, Appellant.

Appeal from the District Court of Dona Ana County.

Statement of Facts.

THIS suit is *a* brought by the appellee against the appellant in support of an adverse claim and contest filed by appellee in the land office at Las Cruces, New Mexico, against an application for patent previously filed in such office by the appellant for the Aluminum Group of placer mining claims, consisting of the International, containing about 132.22 acres; the Aluminum, containing about 111.64 acres; the Hortense, containing about 150 acres, all located in Dona Ana county, New Mexico, in which adverse proceeding the appellee claims to be the owner of five placer mining claims, known respectively as the Agnes, the Lulu, the Lynch, the Tip Top and the Aurora claims, each consisting of about twenty acres, and therein alleged to be in conflict with certain of the area embraced within the Aluminum and Hortense claims, as part of the group for which application for patent had been made by appellant.

The pleadings were as follows: On January 2nd, 1909, appellee filed his complaint alleging citizenship; that the appellant was a corporation organized under the laws of the State of Texas and doing business within the territory of New Mexico; that the appellee on September 12th, 1908, after a discovery of mineral upon unappropriated mineral lands of the United States subject to location and purchase, and by reason of such discoveries and divers locations made and maintained upon such lands, was and still is entitled to the possession of the mining locations claimed by him and above referred to; that the appellee had dispossessed him thereof; the filing by the appellant in the land office on November 25th, 1908, of its application for patent for such Aluminum Group of mining claims and the giving of notice by the Register of the Land Office of such application for patent; that the appellant wrongfully set up and alleged that it was the owner and in possession of such group of mining claims; that the appellee on the 30th day of December, 1908, and during the sixty days' period of publication of the notice of the application for patent, had filed, as required by law, his protest against such application for patent; that proceedings on such application in such land office had been stayed to wait the determination by a court of competent jurisdiction of the right of

possession to the — claimed by appellant and that such suit was brought to determine such right of possession; the appellee further alleged that the Hortense and Aluminum placer claims of the appellee were void, because the appellee had, he alleged, failed to discover any mineral thereupon prior to the locations made by appellee upon the same ground, and, by reason of the failure of the appellant to conform its claim to the public surveys of the United States, and alleged that if said Hortense and Aluminum claims ever had any validity or legal existence, the appellee and its grantors failed to perform the annual labor for the years 1904 and 1905, and each thereof, and thereby forfeited any rights they might have had in such claims and did not resume possession of the work upon the same at any time prior to the acquirement of the appellant and his grantors of that portion of such claims which they had located and asked judgment to the effect that he was the owner and lawfully entitled to the possession of the mine locations claimed by him, and prayed that he have his title thereto and possession thereof quieted and confirmed.

The appellant, answering such complaint, alleged ownership of said Aluminum Group of Mining Claims and each thereof under mining locations and amendatory locations, copies of which were attached to such answer, admitting that it was a corporation as alleged and was in possession of the premises described in the complaint; that it had filed its application for patent for such Aluminum Group as alleged, but denying all other facts alleged in the complaint and praying judgment to the effect that it was the owner and lawfully entitled to the mining claims described in the location notices described and thereto attached, and that it have its title thereto confirmed as against the adverse claim of appellee.

To this answer the appellee replied admitting that on the 12th day of September, A. D. 1908, and for one or more years prior thereto, the land contained in such Aluminum Group of Placer Mining Claims, and each of them, was embraced within one or other of the locations claimed by appellant, but denying that the said locations were valid or duly and lawfully made, or that the appellee was, at the time aforesaid, or at any other time, the owner thereof; admitted that the appellee then held all of the said Aluminum Group of Mining Claims under and by virtue of its location and by virtue of a pretended doing and performance of the matters and things required by law in order to hold and the same but denied that the appellee, by reason thereof, then owned or had ever owned, as against the appellant, that part of the land embraced in the said Aluminum Group of Mining Claims which was claimed by the appellee in his complaint.

By agreement of attorneys of both sides a jury was waived and the case was heard outside of term time by the court, who, on the 17th day of December, 1910, made written Findings of Fact and Conclusions of Law and rendered its judgment against the appellant and in favor of the appellee and to the effect that the appellee recover the possession from the appellant of the

area in conflict between the adverse claims of the respective parties.

The following facts were found by the court:

First. That the mining locations claimed by appellant were made on the following dates: Aluminum, Original Location, Dec. 5, 1900. Hortense, Original Location, March 31, 1902. And those claimed by appellee were as follows: Agnes, Original Location, April 7, 1905, Lulu, Original Location, April 7, 1905.

Second. That the appellant failed to perform the annual labor on the Aluminum and Hortense Claims for the years 1904 and 1905.

Third. That there was no evidence introduced to show whether or not appellant had resumed work upon the Aluminum and Hortense Mining Claims, before appellee made or attempted to make locations of said Lulu and Agnes mining claims.

Fourth. That on the 21st day of November, 1905, appellant applied for patent before the United States Land Office, Las Cruces, for the Aluminum and Hortense Mining Claims as then located and embracing substantially the area now embraced therein, submitted its proofs and thereupon the Register and Receiver acted upon and accepted the same; the appellant paid to such officers in purchase of the area embraced therein the sum of — dollars, being the full amount required under the laws of the United States in purchase thereof and received a final receipt in the usual form for such payment.

Fifth. That the appellee did not adverse or contest the application of the appellant for such patent before the Land Office, or bring suit against the appellant for the possession of any portion of such property before the issuance of such final receipt, but, subsequent to the issuance thereof the appellee and others protested before the said Land Office against the granting of a patent to the appellant on such entry upon various grounds.

275 Sixth. That this final receipt and entry so made of such mining claims was cancelled by decision of the Secretary of the Interior rendered on the 9th day of September, 1908, upon the ground that a portion of the proof submitted with such application i. e. that of the posting of the claim with notice of application, was sworn to outside of the land district in which the claims were situated.

Seventh. That on the — day of May, 1906, subsequent to the time when such final receipt was issued to appellant and previous to the time when the same was cancelled by decision of the Secretary hereinafter mentioned, the appellee entered into and upon such Hortense and Aluminum Mining Claims and made relocations of such Lulu and Agnes mining claims and also originally located thereupon the Tip Top, Aurora and Lynch mining claims.

Eighth. That there was no evidence introduced to show whether at the time of the location of said Tip Top, Aurora and Lynch Mining Claims and the relocation of such Lulu and Agnes Claims by the appellee aforesaid in the year 1906, the appellant had resumed work on the ground embraced on said claims or either thereof.

Ninth. That on the 11th day of September, 1908, after the de-

cision of the Secretary of the Interior, cancelling such final receipt and entry made by appellant, the appellant made amendatory locations of the Aluminum and Hortense mining claims for the purpose of adjusting the land embraced therein to the survey as so made, and so as to make the exterior boundaries of such claims conform to the government sub-divisions.

Opinion of the Court.

MECHEM, J.:

To meet and overcome appellee's proof of the relocation of the Lulu and Agnes claims and the original locations of the Aurora, Tip Top and Lynch claims, made in May, 1906, the appellant introduced its final receipts for the land embraced in the above named claims, issued Aug. 2, 1905 and outstanding in May 1906

276 The court held that the said receipts were from their reception void, nullities and of no effect. This holding of the court was based on the action of the Secretary of the Interior affirming a decision of the Commissioner of the General Land Office cancelling the application of appellant for patent upon which application the said receipts were issued by Receiver of the Land Office at Las Cruces.

The proceeding in the Land Office is entitled *Ex Parte El Paso Brick Company*, 37 L. D. 155. The decision of the Secretary of the Interior was rendered September 9, 1908. After reviewing the objections to appellant's application for patent and the authorities in point, the Secretary said:

"In view of the foregoing it must be held that the affidavit of posting here in question is fatally defective. The defect is not a mere irregularity which may be cured by a subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials of the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been heretofore filed, the Register was without authority to direct the publication of the notice or otherwise proceed and the notice, although in fact published and posted, being without the necessary legal basis, was a nullity and ineffectual for any purpose. The patent proceedings therefore fall and the entry will be cancelled."

Thereafter on the 24th day of November, 1908, the appellant waived before the Secretary of the Interior its right to make a review of such decision and thereupon such decision and the cancellation of said entry became final and said entry was cancelled on the records of the local land office. The appellants insist that the decision of the lower court was erroneous because as by the issuance of the final receipts the land embraced in them became segregated from the public domain, it remained so segregated until the date of cancellation of the receipts.

277 Did the Land Department by its judgment, holding appellant's application for patent void because the officers of the local land office were without jurisdiction, serve to restore the land

to the public domain when the entry was cancelled on the records of the local land office, or was it a decision that the application and the proceedings thereunder were ineffectual for any purpose and therefore of necessity ineffectual to segregate the land applied for from public domain?

There can be no question but that the decision of the Land Department is binding in this case. *Smelting Co. v. Kemp* 104 U. S. 636. *Knight v. U. S. Land Association* 142 U. S. 211.

If binding upon the courts of this territory, it is an adjudication that the final receipts offered by appellant were nullities and therefore properly held by the court below not to in any wise affect the land embraced within them. But counsel for the appellant contend that the decision of the Land Department only went to restoring the land to the public domain when the application for patent was cancelled on the records of the local land office.

No case has been cited by counsel for either party exactly in point. No case has been cited involving an application for patent held by the land department to be void because of a lack of jurisdiction in the local land officers to receive it.

The appellant cites the following rule of the Land Department:

"Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application -or patent."

It is contended that as long as the application for patent remains uncanceled another may not be received for the same land. That the same rule applies to homestead and pre-emption entries and the decisions of the Land Department and the Federal Courts are all unanimous in holding as to such entries two things:

- 1st. That the entry segregates the land from the public domain.
- 2nd. That even if void as long as it remains uncanceled
278 on the records of the land office another entry cannot be received.

There can be no doubt but that a final receipt of mineral lands issued upon a valid application for patent, vests the purchaser with an equitable title to the land and so segregates it from the public domain.

There can be no doubt that even though a final receipt or the equitable title thereby attained may have been the result of fraud and therefore voidable, yet, until avoided it would be valid and existing. *Parsons v. Venske*, 164 U. S. 91. *Adams v. Polglase* 32 L. D. 477.

But in this case it was held that the application for patent was not merely voidable but void.

Counsel for appellant rely upon, among other cases, those of *Germania Iron Co. v. James* 89 Fed. 811 and *James v. Germania Iron Co.* 107 Fed. 605. They say that these decisions are authority for their contention because holding under a similar rule, to the one above stated, but applying to agricultural entries, that no rights can be acquired to land embraced in an entry, until cancellation or its equivalent of the entry has occurred.

The sole question before the court in those cases is stated to be "The question it represents is whether strangers to a contest in which a decision of the Secretary of the Interior was filed in his office in Washington to the effect that a certain entry of the land in question was illegal, and should be cancelled, and that the lands should be open to disposal under the public land laws of the United States, had the right to enter that land at Duluth, in the state of Minnesota, the moment that decision was filed in Washington, or had no such right until the local land officers received the decision and had cancelled the former entry on their plats and records where it was made." 89 Fed. p. 813-814.

The rule of the Land Department plead was "that after a decision of the Secretary had been rendered that a former entry was
279 void and should be cancelled, no subsequent entry of the land could be made until that decision was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records."

Further the Court in its opinion says:

"The Secretary of the Interior is an appellate tribunal in these cases, whose court is held, and whose decisions are filed, more than one thousand miles from most of the inferior tribunals in which the parties appear and institute and try their contests. It is according to the almost universal practice of judicial tribunals for the inferior court to take no action, and allow none to be taken in it, until the decision and order of the appellate court has been officially received and recorded. The reason- for such a rule in the Land Department are far stronger and more imperative, than in ordinary courts of law or equity. It is in the local land office that the rights of the entrymen must be initiated as well as contested. The policy of the government is to afford to the actual settlers, to the pre-emptors and homesteaders, to those who live on or near the public land to be disposed of, every facility to acquire it without burdensome expense or unnecessary trouble. The very existence of local land offices is the outgrowth of the purpose of Congress to carry to the residents of the district in which the lands are situated, not only the tribunals in which they may initiate and try their rights, to obtain portions of the public domain, but all the information to enable them to intelligently prefer and establish their claims." And further in the opinion in 107 Fed. 597 the court said: "Conceding but not deciding that the Secretary's decision was a final judgment of the validity of their claims against the United States and against each other, the crucial question in this case still remains unanswered. That question is whether or not, under that decision, the prior entry of Orille Stram was removed from the land and it was opened to acquisition by strangers to the contest, under the rules and practice of the department before the local land officers cancelled the entry, or
280 were informed on the decision.

"None of the parties to this litigation were parties to that contract, and the question is not the finality of that judgment, but the time when after that decision, under the rules and practice of the Land Department, the land became open to acquisition by strangers.

* * * and by all analogy such a decision of an appellate court has no effect in the inferior tribunal, where rights and contests are initiated until it is received and acted upon by that tribunal.

* * * Turning now to the question at issue, the following propositions will be found to be established beyond controversy: The entry of the land by Stram with his half scrip, whether valid or void, segregated it from the public domain, and appropriated it to private use so that no entry could be made upon it by James or any other applicant before the local land officers received notice of the decision of the Secretary, and cancelled it on their books and plats."

Remembering that the rule of the Land Department construed and applied in that case, was: "That after a decision of the Secretary had been rendered that a former entry was void and should be cancelled, no subsequent entry of the land could be made until the decision was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records." A reading of the decision shows that the question was as to when such decisions took effect as to entries of agricultural lands and by reason of the rule and not by virtue of any law it was held that as to such entries whether void or valid, until their cancellation was noted on the records of the local land offices, no other entry could be made or any other right initiated.

The rule with regard to mineral applications provides that "before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application or patent" and it would seem that as far as receiving a mineral application is concerned this rule would prevent the local land officers from receiving an application for land covered by a prior application until the cancellation of such prior application was noted on their records. And if the rights to mineral lands were initiated by entry those cases would be conclusive. But although a void entry of agricultural lands would by the fact of its pendency prevent another from entering the land, can it be said that a void application for a patent of mineral lands would prevent another from locating the same land?

"It is said in the local land office that the rights of the entrymen must be initiated as well as contested." *Germania Iron Co. v. James* 89 Fed. p. 814.

The pendency of a void entry segregates the land from the public domain, for this reason that until it is cancelled there is no method of procedure whereby anyone may initiate a right to the land because the right is initiated by entry alone and by entry in the local land office. The reason why a decision cancelling entry by the Secretary should not immediately restore the land to the public domain was thus stated by the court in the same case:

"In view of this legislation that would indeed be a strange rule, glaringly inconsistent with the evident intention of congress in establishing local land offices, and with the express provisions of the acts by which they established and developed the land department, which would make the rights of applicants to acquire land more

than one thousand miles from Washington depend on action upon a decision filed there, in a contest to which they were strangers, before it was officially communicated to the officers of the local land office or generally known to the public. Such a rule would enable a sentinel in the office of the Secretary of the Interior to secure for himself and to deprive the citizens of the vicinage of every valuable tract of land restored to the public domain by such a decision, while it would offer patent opportunities for the play of secret and mischievous machinations that might well be avoided. It is the converse of such a rule and practice—it is the rule and practice that the land remained withdrawn from entry or sale until the decision of the Secretary was officially made known to the local land officers, and the notation of the cancellation of the former entry was made on their plats and records,—which the bill alleges was in force when the decision of February 18, 1889 was filed. That practice is consistent with the purpose and provisions of congressional legislation on the subject, gave equal opportunities to all applicants, brought the necessary information to the local land officers in time to enable all who intended to apply for the land to obtain and act upon it without expense and was fair, fitting, just and reasonable."

By section 2 chapter 89, 27 Stat. at large 140. 6 Fed. Stat. Ann. 30 it is provided:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption homestead or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such a cancellation and shall be allowed thirty days from date of such notice to enter said lands" so that the land covered by a void entry remains withdrawn to permit the successful contestant to exercise a preference right of entry.

From the foregoing it will be observed that by entry and by entry alone are rights initiated to agricultural lands. That the existence of one entry whether void or valid precludes another entry and therefore prevents the initiation of a new right. That by the rule and practice of the land department and by statute entries to agricultural lands are kept in force whether void or not until cancelled on the books of the local land office, making the initiation of a new right date not from the judgment of the Secretary of the Interior

but from the action of the local land office in entering the cancellation on their records.

It will not require a great deal of reflection to determine that the rule and practice of the land department with respect to agricultural lands claimed by appellant to have control in this case by analogy, are not applicable to applications for mineral patents. The application for a patent to mineral lands differs from an entry of agricultural lands in many respects, among others in that that applicant for a mineral patent must have a valid location. The application for a patent is not necessary to vest in the claimant title to the claim he possesses. A valid location on the ground followed by recordation of notice of location in the office of the probate

clerk of the county in which the claim is situated and compliance with the law as to annual labor are in themselves sufficient to vest in the locator title to the mining claim.

He can hold it forever as long as he performs the necessary annual labor. The moment he is in default on account of a failure to perform the annual labor the claim is open to relocation by that fact alone.

From this fact arises the rule that the cancellation of a mineral patent does not of itself render the ground embraced by it subject to location. *Beals v. Cone*, 27 Colo. 473—62 Pac. 9 and 8.

It does not restore it in other words to the public domain. The effect of such an adjudication is nothing more than a rejection of the application for patent. The applicant is left with the same rights as if no application had been made. *Beals v. Cone supra*.

It would then appear that the rules of the land department by virtue of which a void entry is effectual not only to withdraw but to keep withdrawn land from entry until the cancellation of the void entry was entered on the books of the local land office should not be

applied in a case like this to restrain the natural, legal and necessary effect of a judgment of the Land Department holding all applications for patent void and a nullity and of no effect as to any proceeding under it.

There seems to be no reason for holding that although by the judgment of the tribunal invested by the government with jurisdiction of such questions, the action of the local land officers in receiving appellant's application and in acting upon it was decided to be without jurisdiction and therefore of no effect whatever. Yet the court below should have held in the face of that decision that the acts of the local officers were merely voidable, not void, so that they did affect the land in question.

The various considerations which led to the adoption of the rules and practice of the land department with respect to entries of agricultural land can only be said to be applicable to applications for mineral patents if at all by analogy and there seems to be no appreciable analogy between them, at least not to the extent of effectuating a practical modification of the judgment of the land department introduced in evidence in the case at bar. We therefore hold that the decision of the trial court, that the final receipts relied upon by appellant were void, nullities and of no effect, was correct.

The court found that neither the locators of the Hortense or Aluminum claims, or any of the said locators of the appellants, or any of its predecessors, did or performed, or caused to be done or performed, the annual labor and improvements required by law upon or for either of said claims, for or during the year 1904, or for or during the year 1905. The appellee located the Lulu and Agnes claims April 1, 1905.

By Sec. 2315, Compiled Laws of New Mexico of 1897, the owner of an unpatented mining claim may make and file with the county recorder proof of labor under oath, containing certain details and that such affidavit when so made and filed, shall be prima facie evidence of the facts therein stated. It is further provided, however,

as follows: "The failure to make and file such affidavit as
285 herein provided, shall, in any contest, suit or proceeding
touching the title of such claim, throw the burden of proof
upon the owner or owners of such claim to show that such work
has been done according to law."

The appellee at the trial introduced in evidence the records of the probate clerk and ex-officio recorder of the county of Dona Ana, and from same was then and there read to the court the affidavit sworn and subscribed by W. F. Robinson, as president of the appellant company, setting forth with particularity the doing of the annual work upon the Hortense and Aluminum claims for the year 1904, but omitting to state "the name or names of the person or persons who performed such work," which the statute requires should be set forth. In tendering such record in evidence, appellee's attorney stated that he did so in order to show that no proper statutory affidavit of such annual labor had ever been filed as provided by the laws of New Mexico. The above was the only proof that was submitted by either side with reference to the question as to whether the annual labor during the year 1904 essential to holding the claim for the year 1905, was done and performed by the appellant on the Hortense and Aluminum claims.

It is the position of appellant's counsel that the affidavit was evidence of the facts therein stated, namely: That the labor for the years 1904 and 1905 was done by appellant. The appellant admits that there were two objections to the affidavit; first, that it was not filed within the time required by the act; second, that it did not give the name or names of the person or persons who performed such work, other than that it was done and performed by the appellant.

In the case of *Upton v. Santa Rita Co.* 14 N. M. 96; 89 Pac. 27a, a proof of labor was offered and objected to, because the affidavit did not state the amount or character of the actual cost of the work
286 done, nor the names of the persons who actually performed
the same, nor the time when it was done. This court in that case held that the proof of labor was properly rejected. It is suggested by counsel for the appellant that this statute by its terms only applies in any contest, suit or proceeding touching the title to the locator's mining claim, and asks if this proceeding is one which involves the title of either party thereto, or if it is one which involves the right of possession by the two claimants only and that it is well understood that it was decided to be the latter in the case of *Upton v. Santa Rita Mining Co.* supra. We think the appellant asks us to put too narrow an interpretation upon this statute and one not justified by its manifest intent. We think that the proof of annual labor prescribed by this statute would inure to the benefit of the locator filing the same in any kind of action in which it was material to establish the performance of such labor.

Counsel for appellant say that there was no obligation of any character upon the appellee to show that the appellant had not filed such an affidavit; that the statute, in substance, is that the burden shall be upon the owner, unless he file such an affidavit, and in order to escape such burden, he must show, therefore, that he has filed

such affidavit; and that if when he offers such affidavit in evidence, the opposing party conceives that it does not comply with the statute, and that therefore "may be excluded, he has then to object to its introduction.

In other words, it is a proposition of counsel for appellant that the appellee should have introduced evidence showing a failure to do the annual labor and if he was able to produce clear and convincing proof of the failure of the appellant to have the annual work done, oftentimes a matter of great difficulty, then the appellant would have been put to proof, and then if he offered the affidavit, the appellee could have objected. No court we take it, would sanction such a waste of time to do an unnecessary thing. The attorney for appellee knew that the appellant had not filed a statutory affidavit. It was

his duty to establish the fact first, and to do that he was
287 compelled to put the record in evidence, and the records contained the faulty affidavit. In this case it is true, as counsel for appellant point out, that appellee could have contented himself with showing that no affidavit was filed within the "sixty days from and after the time within which the assessment work required by law to be done upon the claim should have been done and performed," but that does not alter what would be the effect of a faulty affidavit introduced in evidence for the sole purpose of shifting the burden of proof.

We think that there was an obligation upon the appellee to show that the appellant had not filed such an affidavit. The statute is one of convenience; if the owner will not file the affidavit it places upon him the burden of showing that he has complied with the law, such compliance being necessary to the maintenance of his estate, and the facts proving the same being peculiarly within his own knowledge and easier far for him to show their existence, if they did exist, than it would be upon the other party to show their non-existence.

The appellant contends that no matter how defective the affidavit was under the statute, that the facts therein stated were before the court as evidence when the same was introduced in evidence by the appellee, and that such facts not being disputed by any other evidence, they stand clearly proven. And that the appellee did not attempt to and could not limit the effect of such evidence.

That the appellee did attempt to limit the effect of the proof of labor is shown by the record which recited that "certified copies of proofs filed in June 1905 and on the 28th of December 1906 are offered in evidence, for the purpose of showing, in connection with the testimony of the witness, that there have been no satisfactory proofs of labor filed for any year previous to 1906 the same being marked Exhibits Q and R." The witness mentioned was the officer in custody of the county record.

The rule invoked by appellant's counsel is:

288 "As a general rule, although a document is introduced to prove a particular fact or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes. Nor it is held is a party entitled by an ex-

press qualification at the time of introducing a document to restrict its effect as evidence to a definite purpose; but he is compelled to offer it for what it is worth as evidence generally. "Vol. 17, Cyc. Suj. Evidence, p. 465.

The cases cited to support this rule and the cases cited by appellant's counsel all deal with the documents or books introduced in evidence to establish a fact shown by them in favor of the party introducing them. In this case the appellee did not rely upon any fact shown by the proof of labor. He introduced the proofs to show the non-existence of certain statements which the proofs should have contained. Now it is quite clear that if the proofs of labor had contained other statements of facts which would have explained or qualified the non-existence of the statements without which the proofs were not evidence for any purpose, the appellant should be allowed the benefit of those statements. In that case the appellant would have been within the rule invoked. The mere statements that the appellant had performed annual labor for the years of 1904 and 1905 was not proof, prima facie proof unless it was further shown by what persons the labor was performed. In other words, it was not a fact shown by the proofs without all the other facts required by law to accompany it.

Another consideration suggests itself in this connection and it is that the offer of the evidence was not to establish whether appellant had or had not performed the annual labor but to establish the fact that he had not filed the proof of labor required by the statute. If therefore the proof of labor introduced by appellee by one portion only established the fact desired to be shown by appellee, but by another portion explained away that fact or established its
289 opposite, the whole proof or affidavit was in for such purpose.

And in this case although the appellee in offering the proof of labor for a definite purpose might not be allowed to restrict probative force to that purpose. Yet the appellant would be entitled to use the proofs for what they were "worth as evidence generally."

The ex-parte affidavit was worth nothing as evidence generally unless it complied with the statute.

Finally unless the proof of labor was filed within the time required by the statute it was not evidence of anything.

The appellant claims that the original locations of the Lulu and Agnes did not conform to law in that the same were not located with reference to any permanent monument sufficient for their identification and because the boundaries thereof did not close or meet and such boundaries could not be traced either from the notice or from any markings on the ground. In disposing of these objections it is sufficient to say that evidence was introduced at the trial as to these alleged defects in the location notice and that the court found that the notices did conform to the law. Such a finding will not be disturbed by this court if made on substantial evidence as in this case. *Candalario v. Miera* 13 N.M. 360. *Seidler v. Lafave* 5 N. M. 11, 20 Pac. 789.

The court below held that it was upon the appellant to show that it

had resumed work so as to come within the proviso of the following portion of Sec. 2324:

"And upon a failure to comply with these conditions, the claim or mine upon which such a failure occurred shall be open to relocation in the same manner as if no location of the same had been made, provided that the original locators, their heirs, or legal representatives, have not resumed work upon the claim after failure and before such location."

This is assigned an error. By failure to file the statutory affidavits of proof of labor the burden was on the appellant to prove the performance of the annual labor. This the appellant failed to establish

therefore the claims in question were open to location. 290 provided that the appellant had not resumed work upon its claims after failure and before location by appellee. When the burden by non-compliance with the statute was placed upon the appellant it could have been shifted or met by proof either of the annual labor done at the proper time or work done before the location of appellee. The proviso of the statute calls for an affirmative showing by the original locator. As was observed with regard to annual labor the evidence is peculiarly within the control of the person whose duty it is to do the work. If appellant had in fact resumed work before the date of appellee's locations it could easily have shown it and it was its duty to show it. The claims in this case each covered more than one hundred acres of land. The law required one hundred dollars' worth of work. From this fact it will be seen that impossibility of clear and convincing proof by appellee that appellants had not resumed work on some part of these claims and had not performed one hundred dollars' worth of work.

We are satisfied that the judgment of the court below finding affirmatively in favor of the appellee was correct on the facts and the law applicable to them.

The judgment of the lower court is affirmed.

MERITT C. MECHEM,

Associate Justice.

We Concur:

WILLIAM H. POPE, C. J.

JOHN R. McFIE, A. J.

IRA A. ABBOTT, A. J.

E. R. WRIGHT, A. J.

CLARENCE J. ROBERTS, A. J.

Associate Justice Parker having tried this case below did not take part in this decision.

291 STATE OF NEW MEXICO,

Supreme Court:

I, Jose D. Sena, Clerk of the Supreme court of the State of New Mexico, do hereby certify that the above and foregoing two hundred and ninety (290) pages contain a full, true and complete copy of the record and proceedings, pleadings and opinion in the above entitled cause, which hereby is transmitted to the Supreme Court

of the United States in accordance with an appeal granted herein by the Supreme Court of the territory of New Mexico.

Witness my hand and the seal of said Supreme Court of the State of New Mexico, this the 19th day of January A. D., 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,

Clerk Supreme Court of New Mexico.

Endorsed on cover: File No. 23,047. New Mexico Territory Supreme Court. Term No. 542. El Paso Brick Company, appellant, vs. John H. McKnight. Filed February 6th, 1912. File No 23,047.

7

U.S. SUPREME COURT, U. S.
FILED
DEC 30 1913
JAMES D. MAHER
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 185.

EL PASO BRICK COMPANY, APPELLANT,

vs.

JOHN H. MCKNIGHT,

**APPEAL FROM THE SUPREME COURT OF THE TERRITORY
OF NEW MEXICO.**

BRIEF FOR APPELLANT.

**ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
FRANCIS W. CLEMENTS,**
Attorneys for Appellant.

**W. A. HAWKINS,
JOHN FRANKLIN,**
Of Counsel.



SUBJECT INDEX.

	Page
Statement	1-7
Assignment of errors.....	8
Argument	9-89
I. The court below erred in holding that the location by plaintiff of the Lulu and Agnes claims on April 1, 1905, was valid, notwithstanding that said claims were covered by prior locations by defendant which had performed the assessment-work for 1904, and notwithstanding the absence of all proof that defendant had not resumed such assessment-work in 1905 prior to plaintiff's locations.....	9-46
A. The affidavit of labor was sufficient under the local statute.....	11-14
B. The local statute conflicts with and must give way to the Federal statute.....	14-22
Idaho and New Mexico statutes are exceptional	18-19
New Mexico statute differs even from Idaho statute	19-20
New Mexico statute favors forfeiture; Federal statute opposes forfeiture.....	20-22
C. The affidavit of labor is evidence of all the facts it recites.....	22-33
Plaintiff relied upon facts shown only by the affidavit.....	24-26
Plaintiff did not and could not limit the effect of the affidavit as evidence.....	26-30
Plaintiff was not bound by facts recited in the affidavit.....	31-33
D. Plaintiff had the burden of proving defendant's non-resumption of work before the relocations.....	33-46
Resumption of assessment-work does not restore a lost estate.....	37-43
The New Mexico statute does not relate to burden of proving resumption of assessment-work	43-46

II. The court below erred in holding that the location by plaintiff of the Lynch, Tip Top, and Aurora claims and the relocation of the Agnes and Lulu claims in May, 1906, were valid, notwithstanding that there was then uncanceled defendant's valid entry of October 23, 1905, for the Hortense and Aluminum placers embracing said claims.....	46-89
A. Defendant's entry of October 23, 1905, segregated the land embraced therein from the public domain.....	48-70
Defendant's entry was at most only voidable and was not and could not have been held void	48-51
There is no difference between an agricultural and a mineral entry as withdrawing lands covered thereby from the public domain	51-53
Authorities hold that a mineral entry withdraws lands embraced thereby from the public domain.....	53-59
That an agricultural entry segregates land from the public domain is well settled... ..	60-62
Leading cases on impossibility of the acquirement of rights in mineral lands withdrawn from public domain by entry or otherwise.....	62-70
B. The cancellation of defendant's entry of October 23, 1905, was erroneous.....	71-89
Only the facts found by the Land Department on defendant's first application for patent are binding in this action.....	72-73
Reviewing the legality of the cancellation of defendant's entry in October, 1905, is not a collateral attack upon the Land Department's action.....	73-76
The cancellation of defendant's entry in October, 1905, was erroneous as a matter of law	77-79
As an original matter the cancellation of defendant's entry was an error of law... ..	79-86
Did plaintiff prove that the land in dispute was part of the 'public domain' at the time of his locations, original and amendatory ?.....	86-89

CASES, STATUTES, AND AUTHORITIES CITED.

	Page
Act of September 9, 1850 (9 Stats. L., 446).....	21-22
Act of March 3, 1881 (21 Stats. L., 505).....	2, 86
Adams <i>vs.</i> Polglase, 32 L. D., 477; 33 L. D., 30.....	68-69
American Hill Q. M., Sickle's Min. Dec., 377; S. C. Comm'r's Decision, <i>id.</i> , 384.....	54, 54-55
Anderson <i>vs.</i> Pollard Co., 62 Ga., 46.....	24
Ard <i>vs.</i> Brandon, 156 U. S., 537.....	52, 53
Aurora Hill, etc., Co. <i>vs.</i> 85 Mining Co., 34 Fed. Rep., 515.....	54, 56
Austin <i>vs.</i> United States, 156 U. S., 417.....	37
Axiom Mining Company <i>vs.</i> White, 10 S. D., 198; 72 N. W., 462.....	15
Banks <i>vs.</i> Darden, 18 Ga., 318.....	24
Barringer & Adams, The Law of Mines and Mining, 265.....	53
Batterton <i>vs.</i> Douglas Mining Company (Utah), 120 Pac., 827.....	54
Beal <i>vs.</i> Cone, 27 Colo., 473; 62 Pac., 948.....	15
Belk <i>vs.</i> Meagher, 104 U. S., 279.....	39, 57
Bell <i>vs.</i> Davis, 3 Cranch C. C., 4; 3 Fed. Cas., 102.....	24
Benson Min. Co. <i>vs.</i> Alta Min. Co., 145 U. S., 428.....	54, 55
Birmingham Ry. & Elec. Co. <i>vs.</i> Wildman (Ala.), 24 So., 548.....	25-26
Bishop <i>vs.</i> Balsay (1895), 28 Ore., 119; 41 Pac., 936.....	15, 17
Book <i>vs.</i> Justice Mining Co., 58 Fed. Rep., 106.....	12, 16
Boomer, Daniel C., 18 L. D., 364.....	79
Brandon <i>vs.</i> Ard, 211 U. S., 11.....	52
Bristol <i>vs.</i> Warner, 19 Conn., 7.....	23
Brown <i>vs.</i> Gurney, 201 U. S., 184.....	62-65, 87
Brox <i>vs.</i> Tobias, 17 L. D., 400.....	79
Callahan <i>vs.</i> Jones, 141 Cal., 291; 74 Pac., 853.....	15
Carroll <i>vs.</i> State, 58 Ala., 401.....	35
City Rock <i>vs.</i> King of the West, Copp's U. S. Min. Laws, 217...	82
Cleary <i>vs.</i> Skidlich, 65 Pac., 59.....	88
Cleaves <i>vs.</i> Smith, 22 L. D., 486.....	78
Clements <i>vs.</i> Warner, 24 How., 394.....	52
Coleman <i>vs.</i> Curtis, 12 Mont., 301.....	11-12
Constitution of the United States, Art. VI.....	21
Cooper <i>vs.</i> Reynolds, 10 Wall., 308.....	84-85
Corning Tunnel, etc., Co. <i>vs.</i> Pell, Sickle's Min. Dec., 307.....	77-78
Cranes Gulch Mining Co. <i>vs.</i> Scherrer, 66 Pac., 487.....	54
Crown Point Mining Co. <i>vs.</i> Crismon, 39 Ore., 369; 65 Pac., 87.....	15
Cyc., Vol. 17, p. 465.....	27
David Foote Lode, 26 L. D., 196.....	54
El Paso Brick Co., 37 L. D., 155.....	78
Emerson <i>vs.</i> McWhirter, 123 Cal., 515; 65 Pac., 1036.....	15, 17-18
Encyc. of Evid., Vol. 4, p. 842.....	31

INDEX

Pages

Nelson <i>vs.</i> Champagne Mining & Milling Co., 111 Fed. Rep., 655	54, 55-56
New Mexico, Comp. Laws of, 1897, sec. 2315	6-7, 19
Nielson <i>vs.</i> Champagne Mining & Milling Co., 29 L. D., 491	54
Noonan <i>vs.</i> Caledonia Mining Co., 121 U. S., 393	69
Northern Pacific Ry. Co. <i>vs.</i> Amacker, 175 U. S., 564	52
Paine <i>vs.</i> Wilson, 146 Fed. Rep., 488	25
Parsons <i>vs.</i> Verske, 164 U. S., 89	60
Power <i>vs.</i> Sta., 24 Mont., 243; 61 Pac., 468	15, 42
Providence Gold Mining Co. <i>vs.</i> Burke, 6 Ariz., 323; 57 Pac., 641	15
Quigley <i>vs.</i> Gillett, 101 Cal., 462; 35 Pac., 1040	15
Raymond <i>vs.</i> Nye (Mass.), 5 Met., 151	31-32
Rebecca Gold Mining Co. <i>vs.</i> Bryant, 31 Colo., 119; 71 Pac., 1110	73-75
Reeves <i>vs.</i> Brayton (S. C.), 15 S. E., 658	27
Renshaw <i>vs.</i> Switzer, 6 Mont., 464; 13 Pac., 127	15, 16-17
Rev. Statutes, sec. 2324	9-10, 33
Rowen <i>vs.</i> Chenoweth (W. Va.), 38 S. E., 544	23
St. Paul, M. & M. Ry. Co. <i>vs.</i> Forseth, 3 L. D., 446	60
St. Paul, M. & M. Ry. Co. <i>vs.</i> Leech, 3 L. D., 506	60
Sears <i>vs.</i> Starbird, 78 Cal., 225; 20 Pac., 547	28-29
Selma, Rome, etc., Ry. Co. <i>vs.</i> U. S., 139 U. S., 560	37
Sharp, Fidelo C., 35 L. D., 179	78
Shepley <i>vs.</i> Cowan, 91 U. S., 330	52, 52-53
Sill <i>vs.</i> Reese, 47 Cal., 294	28
Simmons <i>vs.</i> Wagner, 101 U. S., 260	60
Smelting Co. <i>vs.</i> Kemp, 104 U. S., 636	49-50, 72
Smuggler Mining Co. <i>vs.</i> Trueworthy Lode Claim, 19 L. D., 356	54
Snyder on Mines, sec. 493	53
sec. 726	40-41
Southern Cross Gold Mining Co. <i>vs.</i> Sexton, 147 Cal., 758; 82 Pac., 423	50-51, 54, 75-76
Stock Oil Co., 40 L. D., 198	78
Tarpey <i>vs.</i> Madsen, 178 U. S., 215	52
Teller <i>vs.</i> United States, 113 Fed. Rep., 73	54, 55
Union Iron Works <i>vs.</i> Union Natl. Stores Co. (Ala.), 47 So., 652	24
United States <i>vs.</i> Homestake Mining Co., 117 Fed. Rep., 481	23
United States <i>vs.</i> Steenerson, 50 Fed. Rep., 504	66
United States <i>vs.</i> Whitridge, 197 U. S., 135	35
Upton <i>vs.</i> Santa Rita Mining Co. (N. M.), 89 Pac., 275	19
Wailies <i>vs.</i> Davies, 158 Fed. Rep., 667	16
Walden <i>vs.</i> Sherbourne (N. Y.), 15 John., 409	23
Walton <i>vs.</i> Wild Goose Mining & Trading Co., 123 Fed. Rep., 209	16
Weyerhaeuser <i>vs.</i> Hoyt, 219 U. S., 380	52

	Page
Whitney <i>vs.</i> Taylor, 158 U. S., 85.....	60
Willett <i>vs.</i> Baker, 133 Fed. Rep., 937.....	16
Winants <i>vs.</i> Sherman (N. Y.), 3 Hill, 74.....	29
Wisconsin Central Ry. Co. <i>vs.</i> Forsythe, 159 U. S., 46.....	73
Witherspoon <i>vs.</i> Duncan, 4 Wall., 210.....	60
Wright <i>vs.</i> Du Bois, 21 Fed. Rep., 693.....	81
Zerres <i>vs.</i> Vanina, 134 Fed. Rep., 610.....	16
Zerres <i>vs.</i> Vanina, 150 Fed. Rep., 564.....	16

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No 185.

EL PASO BRICK COMPANY, APPELLANT,

vs.

JOHN H. McKNIGHT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY
OF NEW MEXICO.

BRIEF FOR APPELLANT.

Statement.

This is an action begun on January 2, 1909, by appellee McKnight against the appellant El Paso Brick Company in support of an adverse claim filed by the former in the land office at Las Cruces, New Mexico, against the latter's application for patent to the Aluminum group of placer mining claims, consisting of the International, with an area of about 132.22 acres; the Aluminum, with an area of about 111.64 acres, and the Hortense, with an area of about 150 acres.

The action is brought under section 2326 of the Revised Statutes, as amended by the act of March 3, 1881 (21 Stats. L., 505). In the adverse proceeding the appellee asserts the ownership of five placer mining claims, known as the Agnes, the Lulu, the Lynch, the Tip Top, and the Aurora, each embracing about twenty acres. The claims, the ownership of which appellee asserts, are alleged in the adverse claim proceedings to conflict with certain parts of the area embraced within the Aluminum and Hortense claims.

The parties on this record will hereafter be referred to as defendant and plaintiff, respectively.

The case stands on the pleadings as follows:

On January 2, 1909, the plaintiff filed his complaint (R., 1-5), alleging his right to possession, on September 12, 1908, by discovery and location, of the Agnes, Lulu, Lynch, Tip Top, and Aurora mineral claims, describing the same according to the public surveys and the monuments on the premises; his ouster therefrom by defendant on September 12, 1908; the application, on November 25, 1908, by defendant for patent to the International, Hortense, and Aluminum placer claims and the publication of notice thereof by the officers of the local land office; the fact of the inclusion of the claims to which plaintiff asserts the ownership within the claims applied for by defendant; the filing of an adverse claim by plaintiff against defendant's application for patent within the sixty days' period of publication of notice of such application; the staying of further proceedings on the application for patent, awaiting judicial determination of the right to the possession of the premises claimed by plaintiff, and the filing of this complaint within thirty days of the filing of the adverse claim by plaintiff as required by law. The complaint alleges, in conclusion, on information and belief, that the Hortense and Aluminum claims are void because of failure of discovery of mineral thereon; failure by defendant and its grantors to conform such claims to the public surveys, and the failure of defendant and its grantors to perform the annual labor and assessment-work

required by law during the years 1904 and 1905, and the non-resumption by defendant of such work prior to the location by plaintiff of the premises claimed by him.

The defendant's answer (R., 6-8) admits possession of the premises by defendant and also the filing of application for patent as alleged in the complaint; alleges defendant's ownership of the Aluminum group of placer mines under locations, original and amendatory, made long prior in time to those made by plaintiff, and denies all other allegations of the complaint.

The plaintiff's reply to defendant's answer (R., 17-18) is practically a joinder in issue.

A jury trial was waived (R., 162) and the case was heard by the trial court, which made written findings of fact (R., 84-98) and rendered judgment thereon in favor of the plaintiff and against defendant (R., 99-101). An appeal to the Supreme Court of New Mexico was prayed and allowed (R., 104-106), and on December 23, 1911, that court entered a judgment of affirmance (R., 136-138).

The facts found by the Supreme Court of New Mexico (R., 140-154) are substantially as follows:

On December 15, 1900, eight persons located the Aluminum placer claim, situated upon the unsurveyed public domain in Dona Ana County, New Mexico, and containing about 160 acres, having made discovery of valuable mineral deposits thereon, and recorded notice of location in the proper county recorder's office on January 10, 1901 (Finding I, R., 140). On March 31, 1902, these same persons located the Hortense placer claim in Dona Ana County, having made discovery of valuable mineral thereon, and caused notice of such location to be recorded on April 30, 1902 (Finding II, R., 141). These two placer claims were conveyed, without consideration, by mesne conveyances, to the defendant company, which was then in possession of a placer claim, called the International, adjoining and contiguous to the territory embraced in the Hortense and Aluminum placers. On this

claim (the International) there was a large deposit of red shale, and defendant had constructed on that claim a plant for the manufacture of brick therefrom (Findings III, IV, R., 141). The annual assessment-work for the years 1904 and 1905 was not done or performed upon the Hortense and Aluminum claims either by defendant company or by the original locators (Finding V, R., 141). The error of law upon which this finding is based will be discussed *infra*. On April 1, 1905, the plaintiff located, upon territory included within the Hortense and Aluminum claims, two placer claims, called the Lulu and the Agnes, having discovered prior to such location valuable mineral deposits thereon, and duly recorded notice of location (Finding VI, R., 141-144). On August 2, 1905, the defendant made application in the local land office at Las Cruces, New Mexico, for patent to a group of placer mining claims, comprehending the International, Aluminum, and Hortense placers; publication of notice of application for patent was made; defendant paid to the proper land office official the amount required by law for the purchase of the claims, and on October 23, 1905, the Receiver of the land office issued to defendant a final receipt for the amount of such payment. The entry covered by such receipt was held for cancellation by the Commissioner of the General Land Office on September 4, 1906, after due notice. On appeal to the Secretary of the Interior, the decision of the Commissioner, holding such entry for cancellation, was affirmed on September 9, 1908. This decision of affirmance was based solely upon the alleged insufficiency of the affidavit of posting of notice of application for patent on the premises because verified outside of the land district instead of within such district as required by Rev. Stat., sections 2325 and 2335, though the fact of continuous posting of the notice, with accompanying plat, from June 10, 1904, to October 20, 1905, was conceded, and though properly verified affidavits were submitted in answer to the Commissioner's rule directed to defendant to show cause why the

entry should not be cancelled (Findings VIII and XVI, R., 144-149, 153). The Secretary said (R., 148-149):

"In view of the foregoing it must be held that the affidavit of posting here in question is fatally defective. The defect is not a mere irregularity, which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been heretofore filed, the Register was without authority to direct the publication of the notice or otherwise proceed and the notice, ALTHOUGH IN FACT PUBLISHED AND POSTED, being without the necessary legal basis, was a nullity and ineffectual for any purpose. The patent proceedings therefore fall and the entry will be canceled."

In May, 1906, the plaintiff relocated the Lulu and Agnes claims, and also located contiguous thereto the Lynch, the Tip Top, and the Aurora claims, all embraced within the Aluminum and Hortense placers, claimed by defendant company (Finding IX, R., 150-151). The plaintiff did the necessary annual assessment-work on all of the claims, to which he asserts a right during 1906, 1907, and 1908 (Finding X, R., 152). (This finding is contradicted by the tabulated statement marked "Exhibit No. 5" (R., 60), from which it appears that from 1905 to 1908, inclusive, \$357.20 worth of work was done on the Lulu, \$107.00 worth on the Agnes, \$74.25 worth on the Tip Top, \$13.00 worth on the Lynch, and none at all on the Aurora, making a total of \$551.45.) On September 11, 1908 (the lands having been surveyed since the original locations), defendant filed amendatory locations of the Hortense and Aluminum claims to conform to such public surveys (R., 56-59), and on November 25 following again made application in the land office at Las Cruces, N. M., for patent to such claims as relocated (Findings XII, XIII, and XVIII, R., 152-153, 154). On

December 30, 1908, plaintiff filed his protest and adverse claim against such application, setting out the nature, extent, and boundaries of such claim, and thereupon further proceedings upon defendant's application for patent were stayed awaiting judicial determination of the right to the possession of the premises adversed. Within thirty days after the filing of protest the plaintiff filed this suit (Finding XIV, R., 153). No evidence was introduced to show whether or not defendant company had resumed assessment-work upon its Aluminum and Hortense placers before the location by plaintiff of his five claims (Findings XV and XVII, R., 153, 153-4).

The court below found further that the value of the matter in dispute, excluding costs, exceeds the sum of \$5,000 (Finding XIX, R., 154). Under section 2 of the act of April 7, 1874 (18 Stats. L., 27), and section 245 of the Judicial Code this court, therefore, has jurisdiction by appeal (jury trial having been waived) to review the decision of the lower court.

From the opinion of the court below it appears that the finding of the non-performance by defendant of the annual assessment work during the year 1904 was based *solely* upon the assumed insufficiency of the affidavit of labor recorded in the Probate Court for Dona Ana County, under the local territorial statute, section 2315, Compiled Laws of New Mexico of 1897, the court expressly stating that this affidavit "was the only proof that was submitted by either side with reference to the question as to whether the annual labor during the year 1904 essential to holding the claim for the year 1905, was done and performed by the appellant on the Hortense and Aluminum claims" (R., 170). This statute provides:

"The owner or owners of any unpatented mining claim in this Territory, located under the laws of the United States and of this Territory, shall, within sixty days from and after the time within which the assessment work required by law to be done upon

such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character, and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be *prima facie* evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall in any contest, suit or proceedings touching the *title* to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

The affidavit of labor so held to be insufficient (R., 51-52) recites that during the year 1903 "there was done and performed by and for the El Paso Brick Company" upon the International, Aluminum, and Hortense placers more than \$5,000 worth of development work, describing the same in detail, and that during the year 1904 more than \$5,000 worth of development work was done on those claims, with a like detailed description thereof. This affidavit was verified on April 25, 1905, and recorded on June 8 following. This affidavit the court held insufficient under the statute quoted *supra*, because it omitted to state "the name or names of the person or persons who performed such work," and because it was not filed within the time prescribed by the statute. By virtue of the last sentence of the statute the court held the burden, in view of the insufficiency of the affidavit, was upon the defendant company to prove that it had performed the annual assessment work for 1904. Hence, giving full effect to the decision of the court below, that court found affirmatively that the necessary development work for the year 1904 had not been done *in the total absence of all evidence one way or the other as to whether it had in fact been done or not*. And for this singular finding the court relied, as pointed out, upon the provisions of the local statute.

Assignment of Errors.

The errors assigned (R., 157-159) reduce themselves to these two propositions, which will be discussed in the order stated:

I. THE COURT BELOW ERRED IN HOLDING THAT THE LOCATION BY PLAINTIFF OF THE LULU AND AGNES CLAIMS ON APRIL 1, 1905, WAS VALID NOTWITHSTANDING THAT SAID CLAIMS WERE COVERED BY PRIOR LOCATIONS BY DEFENDANT WHICH HAD PERFORMED THE ASSESSMENT WORK FOR 1904, AND NOTWITHSTANDING THE ABSENCE OF ALL PROOF THAT DEFENDANT HAD NOT RESUMED SUCH ASSESSMENT WORK IN 1905 PRIOR TO PLAINTIFF'S LOCATIONS;

II. THE COURT BELOW ERRED IN HOLDING THAT THE LOCATION BY PLAINTIFF OF THE LYNCH, TIP TOP, AND AURORA CLAIMS AND THE RELOCATION OF THE AGNES AND LULU CLAIMS, IN MAY, 1906, WERE VALID NOTWITHSTANDING THAT THERE WAS THEN UNCANCELED DEFENDANT'S VALID ENTRY OF OCTOBER 23, 1905, FOR THE HORTENSE AND ALUMINUM PLACERS, EMBRACING SAID CLAIMS.

ARGUMENT.

I.

The court below erred in holding that the location by plaintiff of the Lulu and Agnes claims on April 1, 1905, was valid notwithstanding that said claims were covered by prior locations by defendant which had performed the assessment work for 1904, and notwithstanding the absence of all proof that defendant had not resumed such assessment work in 1905 prior to plaintiff's locations.

The validity of the Lulu and Agnes locations in April, 1905, was predicated solely upon the finding of the court that defendant company had failed to do the annual assessment work on the Hortense and Aluminum placers, within which plaintiff's locations were embraced, during the year 1904, and that by reason of such failure defendant company forfeited all right to such placers, which became thereby part of the public domain subject to relocation. This finding of fact, as has been pointed out, was based entirely on the asserted insufficiency of the affidavit of labor recorded by defendant in Dona Ana County on June 8, 1905, and *not upon any affirmative evidence adduced by plaintiff that such assessment work had not in point of fact been done.*

The act of May 10, 1872 (17 Stats. L., 92), as embodied in Revised Statutes, section 2324, provides as follows in regard to the forfeiture of a claim upon which there has been a failure to do the annual assessment work:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hun-

dred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditures may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

It is submitted that the court below was wrong in holding as valid the Lulu and Agnes locations, made in April, 1905. It is further submitted that those locations were invalid in law (A) because defendant's affidavit of labor for 1904, recorded in June, 1905, was sufficient under the territorial statute; (B) because if such affidavit were insufficient under the local statute that statute is in conflict with, and hence must give way to, the Federal statute (Rev. Stat., sec. 2324) as construed by this court; (C) because that affidavit, having been introduced in evidence by plaintiff, was admissible as evidence of all the facts therein stated; (D) because the burden was upon plaintiff to prove that the defendant company had not resumed work before he made the locations in question, and the absence of all evidence on this question constitutes an impassable barrier to plaintiff's recovery in this action.

A.

The Affidavit of Labor was Sufficient under the Local Statute.

The court below held defendant's affidavit of labor insufficient under the local statute because (1) it omitted to give the names of the persons who performed the assessment work and (2) was not filed within the statutory time. The New Mexico statute (see *supra*, pp. 6-7) prescribes that the affidavit shall state "the name or names of the person or persons who performed such work" (*i. e.*, the annual assessment work) and shall be filed within sixty days after the expiration of the time for doing the assessment work. The affidavit of the performance of the annual assessment work in 1904 recites that "there was done and performed by and for the El Paso Brick Company" upon the placer claims in question work of the value of more than \$5,200 and gives full detail thereof. This we submit sufficiently names the persons who performed the work within the meaning of the statute. To hold, as did the court below, that the statute requires the detailed enumeration of the names of all persons who performed the work would in many cases make compliance with the statute practically impossible. It may reasonably be assumed that the work described in this affidavit was performed by a large number of persons and by working crews whose personnel was constantly shifting. If a literal compliance with the statute is required, and if the omission of the affidavit to include the name of only one person who performed such labor is fatal, then it must be conceded that the beneficent purpose of the statute to provide "a convenient method of preserving *prima facie* evidence of the annual representation of mining claims, by the performance of the labor or making of the improvements of the value required thereon, by putting such evidence in the form of an affidavit, stating the facts required" as held in *Coleman vs.*

Curtis, 12 Mont., 301, 305, is thwarted, and the statute becomes instead a trap for the *bona fide* locator, whereby he loses not only the ground covered by his original location but his assessment work as well. The general purpose of local statutes such as that of New Mexico here in question is well stated in *Book vs. Justice Mining Company*, 58 Fed. Rep., 106, 118, where Judge Hawley, construing the Nevada statute, said:

"The object of this act was evidently to fix some definite way in which the proof as to the performance of the work or expenses incurred in the making of improvements might be in many cases more accessible. In all mining communities there is liable to be some difficulty in finding the men who actually performed the labor or made the improvements and procuring their testimony, in order to establish the facts necessary to show a compliance with the mining law in this respect. * * * Locators of mining claims would doubtless often save much time and trouble, as well as hardship, inconvenience, and expense, by complying with the provisions of this act; but the act does not prevent, and was not intended to prohibit, the owners of a mining claim from making the necessary proof in any other manner, nor does it prohibit the contesting party from contradicting the facts stated in the affidavit."

This statute should be construed with its objective purpose always in view; and so construing it we submit that a substantial and not a literal compliance with its provisions is all that is required. Here, certainly, if there has not been a literal compliance with its requirement that the names of the persons performing the work be stated, there has at least been a substantial compliance therewith.

Suppose the affidavit in this case had recited that the annual work was done by the XY Construction Company, a corporation. Manifestly it would have named the legal person that performed the work and would hence have satisfied the statute. Yet it would not have been more definite than the

statement that the work was done "by and for the El Paso Brick Company." Neither the XY Construction Company in the case supposed nor the El Paso Company in the case actually in hand could have performed the work in person as a matter of fact, because the legal entity, which is the essence of all corporate organization, is incapable of acting in any manner except through servants or agents. But if an enumeration of all such servants and agents who participated in the work be what the statute intended to require, then, as has been pointed out, it attempts to confer a benefit upon the original locator on the one hand, and on the other it robs him of the very benefit intended to be conferred.

The affidavit in question was recorded on June 8, 1905 (R., 52), or three months and eight days after the period allowed by the statute. This, it is submitted, did not make the affidavit inadmissible for the purpose outlined in the statute, because the provision as to time of filing must be considered to be directory merely and not mandatory. Here again the underlying purpose of the statute must be used as the proper criterion for its construction, and with this criterion in mind the requirement as to time of filing should be considered to be directory only.

The New Mexico statute in question is undoubtedly in derogation of the common-law right of the locator. It gives him no advantage which he did not have at common law. It provides that a failure to comply with its provisions takes away from him his right to compel his adversary to prove his case fully before presenting his own proof and allows a relocater to obtain judgment if the original locator offers no proof. Since it is a burdensome statute, in derogation of the common law, an attempted compliance on the part of a locator should, if such compliance is, as appears here, substantial, be viewed liberally, in accordance with the well-known rule of construction that such statutes should be construed strictly against the imposition of a penalty and liberally in favor of its non-imposition.

It thus appears that the affidavit of the performance of the assessment-work for 1904, held by the court below to be legally insufficient, was in substantial compliance with all the requirements of the local territorial statute, and therefore should have been held to be legally sufficient.

B.

The Local Statute Conflicts with and Must Give Way to the Federal Statute.

Even if the affidavit be considered defective under the local statute, that statute is in conflict with and hence must give way to the Federal statute. The Federal statute referred to is embodied in section 2324 of the Revised Statutes. (See *supra*, pp. 9-10.) In *Hammer vs. Garfield Mining Company*, 130 U. S., 291, 301, this court, interpreting the Federal law in question, said:

"As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretence of a forfeiture was that sufficient work, as required by law, each year, was not done on the claim in 1882; and that the evidence adduced by him on that point was very meagre and unsatisfactory, and was completely overborne by the evidence of the plaintiff. *Belk vs. Meagher*, 104 U. S., 279. A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law."

This construction of the Federal statute becomes part and parcel of it, just as much so as if contained therein in express language. That it has been generally adopted both in the State and in the Federal courts is shown by the following cases:

Arizona:

Providence Gold Mining Company vs. Burke (1899),
6 Ariz., 323; 57 Pac., 641.

California:

Quigley vs. Gillett (1894), 101 Cal., 462; 35 Pac.,
1040, 1042.

Harris vs. Kellogg (1897), 117 Cal., 489; 49 Pac.,
708, 709.

Emerson vs. McWhirter (1901), 133 Cal., 515; 65
Pac., 1036, 1038.

Callahan vs. Jones (1903), 141 Cal., 291; 74 Pac.,
853, 854.

Goldberg vs. Bruschi (1905), 146 Cal., 291; 81 Pac.,
23, 24-25.

Colorado:

Beal vs. Cone (1900), 27 Colo., 473; 62 Pac., 948,
958.

Hall vs. Kearney (1893), 18 Colo., 505; 33 Pac., 373.

Johnson vs. Young (1893), 18 Colo., 625; 34 Pac.,
173.

Montana:

Power vs. Sla (1900), 24 Mont., 243; 61 Pac., 468,
471.

Renshaw vs. Switzer (1887), 6 Mont., 464; 13 Pac.,
127, 127-128.

Oregon:

Bishop vs. Baisley (1895), 28 Ore., 119; 41 Pac., 936,
938-939.

Crown Point Mining Co. vs. Crismon (1901), 39 Ore.,
369; 65 Pac., 87.

South Dakota:

Axiom Mining Company vs. White (1897), 10 S. D.,
198, 201; 72 N. W., 462.

United States:

Mt. Diablo Mill & Mining Company vs. Callison, 5
Saw., 439; 17 Fed. Cas., 918, 925.

- Book vs. Justice Mining Co.*, 58 Fed. Rep., 106, 117, 118.
Justice Mining Co. vs. Barclay, 82 Fed. Rep., 554, 559.
Walton vs. Wild Goose Mining & Trading Co., 123 Fed. Rep., 209, 219.
McCulloch vs. Murphy, 125 Fed. Rep., 147, 150.
Willit vs. Baker, 133 Fed. Rep., 937, 946.
Zerres vs. Vanina, 134 Fed. Rep., 610, 614.
McKay vs. Neussler, 148 Fed. Rep., 86, 88.
Zerres vs. Vanina, 150 Fed. Rep., 564.
Wailes vs. Davies, 158 Fed. Rep., 667, 669.

As illustrating the application of the construction of section 2324, Revised Statutes, announced in the case of *Hammer vs. Garfield Mining Company*, *supra*, the following extracts are quoted:

"We have many times decided that the valid location of a mining claim is a grant, from the government to the person making the location, of the claim located, and carried with it the right, by a compliance with the law, of acquiring a full title. The location is the inception of the grant, and the patent is its consummation. The grant is kept alive by representation, as the law provides. A failure to represent forfeits the grant, and makes void the title acquired by a valid location. Upon such failure, the ground becomes again subject to location and purchase. But, in order to validate a subsequent location, it must be established that the prior grant has become forfeited. The grant evidenced by a valid location continues operative and in full force, so as to protect the ground from a subsequent location, until the title thereby acquired, by a failure to represent or otherwise, has become forfeited. A valid location, and the grant thereby evidenced, remains in full force and effect until something is *alleged and proved* against it to defeat the grant. It follows, therefore, that matters of forfeiture whereby the title to a mining-claim location is defeated must be set forth in the complaint

or answer. They cannot be proved unless they are alleged. Forfeiture is something whereby a title is to be defeated or set aside. It is that upon which the second claimant bases his right of location. He must *allege* and *prove* on the trial that the right of the first locator is gone before his location has any validity."

Renshaw vs. Switzer, 6 Mont., 464; 13 Pac., 127, 127-128.

"1. A mining claim, subsequent to a valid location, is property, in the highest sense of the term. It may be bought and sold, and will pass by descent. It carries with it the 'exclusive right of possession and enjoyment of all the surface included within the lines' of location. The right is a valuable one, and is protected by law. It continues until there shall be a failure to represent the claim; that is, to do the requisite amount of work within the prescribed time. The right of possession and enjoyment acquired by location is kept alive by the representation prescribed by law, but, when not thus kept alive, the right is forfeited, and the claim is thereafter open for relocation. In order, therefore, to secure a valid location, it must be established that rights acquired under a prior one upon the same claim have been forfeited. The affirmative of this proposition is always cast upon the party seeking to establish it, and hence, under the rules of pleading, it must be specially pleaded, where opportunity is offered, before a party can be heard to support it with evidence."

Bishop vs. Baisley, 28 Ore., 119; 41 Pac., 936, 938-939—opinion by Wolverton, J.

"Where a valid location of a mining claim has been made, and work done thereon in good faith, possession maintained, and no evidence appears from which an intention to abandon may be inferred, the courts should construe the law liberally to prevent forfeiture. Indeed, this is the rule generally as to forfeitures. The courts are reluctant to enforce a forfeiture, deeming this class of penalties odious in law; and it is well settled by decisions that forfeiture cannot be established except upon clear and convincing proof of the

failure of the former owner to have performed the labor to the amount required by law, the burden of proving which rests with the party asserting it."

Emerson vs. McWhirter, 133 Cal., 515; 65 Pac., 1036, 1038.

"The Revised Statutes of the United States (section 2324, U. S. Comp. Stat. 1901, p. 1426) do not use the word 'forfeiture.' The provision is: 'Upon a failure to comply with these conditions (among them to do the required annual work) the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made.' Treating this provision as, in effect, working a forfeiture, the courts have held that it cannot be established except upon clear and convincing proof of the former owner to have had work performed or improvements made to the amount required by the law (*Hammer vs. Garfield M. Co.*, 130 U. S., 291; 9 Sup. Ct., 548; 32 L. Ed., 964); and, as we have seen, the burden of proving failure to comply with statutory conditions is upon the one who asserts it."

Goldberg vs. Bruschi, 146 Cal., 708; 81 Pac., 23, 24-25.

These quotations show adequately the practical universality of the application of the Federal statute as construed in the *Garfield Mining Company* case, *supra*. The obvious underlying principle of these decisions is that a forfeiture of any kind should never be presumed, and that in the construction of a statute, or written instrument of any sort, every doubt is to be resolved against a result that will produce a forfeiture.

Idaho and New Mexico Statutes are Exceptional.

In Idaho and New Mexico alone is the Federal statute applied in a manner different from its application in the cases cited (*Lindley on Mines*, 2d ed., sec. 636). The Idaho statute (Civ. Code, 1901, sec. 2565) in regard to the re-

cordation of the affidavit of the performance of assessment-work provides:

"Such affidavit, or a certified copy thereof in case the original is lost, shall be *prima facie* evidence of the performance of such labor. The failure to file such affidavit shall be considered *prima facie* evidence that such labor has not been done."

The New Mexico statute, however, differs even from the Idaho statute. It provides (Comp. Laws of 1897, sec. 2315):

"The failure to make and file such affidavit as herein provided shall * * * throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

In *Upton vs. Santa Rita Mining Co.* (N. M.—1907), 89 Pac., 275, 287-288, the court below sustained the action of trial court in striking from a requested instruction on the forfeiture of a mining location by failure to do the annual assessment work required by statute the words "and such forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have performed the work or made the improvements to the amount required by law," though the court conceded that the words so stricken out were "undoubtedly a correct statement of abstract law," citing therefor, among other cases, the *Garfield Mining Company* case, *supra*. The holding of that case was not followed because of the above provision of the New Mexico statute.

New Mexico Statute Differs Even from Idaho Statute.

But there is a wide difference between the Idaho and New Mexico statutes. The former, in addition to the usual provision that the recorded affidavit "shall be *prima facie* evidence of the performance of such labor," provides that "the failure to file such affidavit shall be considered *prima facie* evidence

that such labor has not been done." This latter provision does not cast upon the original locator who has failed to file the statutory affidavit *the burden of proving* that he has done the annual assessment-work. It merely casts upon him under the circumstances stated *the burden of procedure, the burden of first offering evidence* as to the performance of the annual labor required, while the burden of proof, which in this instance is to show by a preponderance of the evidence that such labor has not been done, rests always upon the relocator seeking to justify his relocation. The statute merely prescribes that when the relocator has proved that the original locator has not filed the affidavit he has made out a *prima facie* case. If, however, the original locator then introduces evidence as to the performance by him of the annual labor offsetting the *prima facie* showing made by the relocator and no further evidence is introduced, judgment must be for the original locator. Not so, however, under the New Mexico statute. Proof by the relocator of the failure to file the statutory affidavit imposes upon the original locator not only the burden of offering offsetting evidence, as under the Idaho statute, but also the burden of proving *by a preponderance of the evidence* that he has performed the annual assessment-work. The New Mexico statute is hence unique in local legislation respecting the recordation of an affidavit of annual labor and the probative effect thereof. Though at first blush it seems to have its counterpart in the Idaho statute, in the last analysis it is radically different therefrom. Consequently it may well be that the New Mexico statute conflicts with the Federal law as construed by this court, while the Idaho statute does not.

New Mexico Statute Favors Forfeiture; Federal Statute Opposes Forfeiture.

We submit, without reference to whether the Idaho statute is valid or invalid, that the New Mexico statute is in conflict with and must give way to the Federal statute. The latter

as construed by this court requires "clear and convincing proof of the *failure* of the former owner to have work performed, or improvements made, to the amount required by law" in every case. The New Mexico statute, on the other hand, in a case where the original locator has failed to file an affidavit of labor, requires clear and convincing proof of the *performance* by the former owner of work or improvements "to the amount required by law." The Federal statute requires strict proof of *non-performance* of the annual labor, *in every case*, to sustain the validity of a relocation. The New Mexico statute, in a case where no affidavit or a defective affidavit is filed, requires proof, by a preponderance of the evidence, of the *performance* of the annual labor. The Federal statute puts the burden of proof *in all cases* upon the relocater; the New Mexico statute, in the case supposed, puts that burden upon the original locator. The Federal statute resolves every doubt *against* the forfeiture of a valid location and requires strict proof of such *forfeiture*; the New Mexico statute, in the case supposed, resolves every doubt in favor of the forfeiture of a valid location and requires strict proof of *non-forfeiture*. This, it is submitted, shows a sharp conflict between the Federal statute and the local New Mexico statute. Can there be any doubt as to which statute must be supreme and which must be held invalid especially in view of the Constitutional provision that "the Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding" (Constitution, article VI), and further in view of the provisions of the act of September 9, 1850 (9 Stats. L., 446, 449), establishing a territorial government for New Mexico which provides "That the legislative powers of the Territory shall extend to all rightful subjets of legislation, consistent with the Constitution of the United

States and the provisions of this act; *but no law shall be passed interfering with the primary disposal of the soil?*" We submit not.

C.

The Affidavit of Labor is Evidence of All the Facts it Recites.

The affidavit of the performance of labor by defendant, introduced in evidence by plaintiff, was admissible as evidence of all the facts therein stated in favor of defendant. This affidavit was the only evidence in the case as to whether the annual representation work for 1904, the non-performance of which was essential to the validity of the locations of the Lulu and Agnes claims in April, 1905, had been performed by defendant company (R., 170).

It is submitted that when a document is admitted in evidence without objection it is competent evidence as to all facts therein stated, both those in favor of the party tendering the same in evidence and those in favor of his adversary, and the party making such tender has no right to insist that the document shall be received only so far as it is favorable to his contentions. In *Greenleaf's Lessee vs. Birth*, 5 Pet., 132, 137-138, Justice Story said:

"It is not one of the least curious circumstances of this case that copies of the same deeds were alternately offered as evidence, for the same purposes, by each of the parties, and specifically objected to by the other, and rejected by the court. In the ordinary course of things, the party offering such evidence is understood to waive any objection to its competency as proof.

* * * * *

"It is not competent for a party to insist upon the effect of one part of the papers constituting his own evidence, without giving the other party the benefit of the other facts contained in the same papers."

In *United States vs. Homestake Mining Company* (C. C. A., 8th Cir.), 117 Fed. Rep., 481, 489, the court said:

"In proving its case the United States offered in evidence that part of the affidavit of the superintendent of the defendant which stated the amount and character of the timber cut. The defendant at the same time offered the remainder of this affidavit, and it was admitted in evidence without objection. The affidavit set forth the agreement with the Secretary of January, 1898, the advice of counsel for the defendant, the cutting and use of the wood and timber under that advice, the belief of the defendant that it had the right to take and use this timber under the agreement of January, 1898, and every fact material to establish the innocence and good faith of the company. An insuperable objection might have been made to the introduction of this affidavit on the ground that no opportunity had been given to the plaintiff to cross-examine the person who verified it, and on the ground that his testimony had not been so taken and returned as to make it competent evidence. But no such objection was interposed, and the affidavit thus admitted in evidence without objection became uncontradicted evidence of the facts which it detailed. Forms and rules are prescribed by statutes, courts, and decisions for the taking and production of testimony which give to the opposing party the right and the opportunity of cross-examination and the security of an oath. But this right, this opportunity and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony; and when this is done the statement or affidavit admitted becomes as competent evidence of the facts it details as though every formality had been complied with."

To like effect are also

Bristol vs. Warner, 19 Conn., 7, 18-19.

Rowen vs. Chenoweth (W. Va.), 38 S. E., 544, 546.

Walden vs. Sherburne (N. Y.), 15 John., 409, 423-424.

Union Iron Works vs. Union National Stores Company (Ala.), 47 So., 652, 653.

Bell vs. Davis, 3 Cranch C. C., 4; 3 Fed. Cas., 102

Banks vs. Darden, 18 Ga., 318, 341-342.

Anderson vs. Pollard Company, 62 Ga., 46, 53.

Lewin vs. Dille, 17 Mo., 64, 69.

The court below held that the rule of evidence which makes a document, or written evidence of any sort, when introduced, evidence of all facts therein stated is inapplicable here, saying (R., 172) :

"The cases cited to support this rule and the cases cited by appellant's counsel all deal with the documents or books introduced in evidence to establish a fact shown by them in favor of the party introducing them. In this case the appellee did not rely upon any fact shown by the proof of labor."

Plaintiff Relied upon Facts Shown Only by the Affidavit.

To show the insufficiency of the affidavit under the territorial statute, plaintiff sought to prove two things, (1) the failure of the affidavit to enumerate in detail the names of the persons who performed the assessment work and (2) the tardiness of the filing of the affidavit. Both of these things were facts to be proved by evidence just as all facts must be proved. While the plaintiff "did not rely upon any fact shown by the proof of labor" in regard to the kind, amount, and sufficiency of the labor therein recited to have been done by defendant company, he did rely upon the facts shown, if at all, by the proof of labor, and shown nowhere else in the record, that such proof was not recorded within the statutory period, and that it failed to give the names of the persons who performed that labor. If he introduced, as he did, this proof of labor, relying upon the statements therein made that "there was done and performed by and for the El Paso Brick Company in work upon said claims"

(R., 51) and "Filed for record this 8th day of June, A. D. 1905, at 10 o'clock A. M.," which statements he stoutly contended were in his favor, then there is no reason why defendant company should not be allowed to rely upon any other statements therein made which it conceives to be favorable to its contentions. The matters sought to be proved by plaintiff were facts essential to his case and they were shown, if at all, solely and only by the proof of labor.

It may be that if defendant company had offered this affidavit in evidence as showing the proper performance by it of the annual representation work, it could have been excluded upon objection as incompetent. Yet if defendant company had tendered it in evidence and no objection had been made to its introduction it would have gone in as evidence of all of the facts therein recited. The mere fact that abstractly considered a piece of evidence may be incompetent, irrelevant, or inadmissible for any other reason does not prevent its being used in a case if the parties thereto so desire. The parties may stipulate what the facts of a case are, and hence may also stipulate what evidence may be introduced to prove those facts. In *Paine vs. Wilson*, 146 Fed. Rep., 488, 491-492, the court said:

"Forms and rules for the taking and introduction of evidence are prescribed by statutes and decisions, which give to the opposing party the right to the production of the best evidence of a fact, but he may waive these rules, permit the introduction of inferior evidence, or stipulate the existence of a fact, and when he does so that fact is deemed established by the best evidence by which it is provable."

In *Birmingham Ry. & Elec. Co. vs. Wildman* (Ala.), 24 So., 548, 550, the court said:

"Parties have an undoubted right to try their case on illegal evidence if they so desire; and, if illegal evidence is admitted without objection it is the right and duty of the jury to give it such consideration as it would be entitled to if legal evidence, and it is also

the right and duty of counsel in argument to aid the jury in determining the weight and effect it should have."

To like effect are:

Jaffry vs. Thompson (Ia.), 21 N. W., 659, 661.

Montgomery vs. State (Fla.), 45 So., 879, 882.

Goodall vs. Norton (Minn.), 92 N. W., 445, 446.

In the case in hand the affidavit was not offered in evidence by defendant company and allowed to go in without objection by plaintiff; *it was introduced by the plaintiff himself*, and he could not object to its admission in whole or in part. *A fortiori*, therefore, must it be evidence of all the facts therein stated.

Plaintiff Did Not and Could Not Limit the Effect of the Affidavit as Evidence.

The question now narrows itself down to this: Did plaintiff attempt to limit the effect to be given the affidavit as evidence in the case, and could he properly make such limitation? The statement of plaintiff's counsel in offering the affidavit in evidence during the examination of the custodian of county records was (R., 171):

"Certified copies of proofs filed in June, 1905, and on the 28th day of December, 1906, are offered in evidence, for the purpose of showing, in connection with the testimony of the witness, that there have been no satisfactory proofs of labor filed for any year previous to 1906, the same being marked Exhibits Q and R."

Was this an attempt to limit the effect to be given the affidavit as evidence in the case? We submit not. It was merely a declaration of "*the purpose*" for which it was introduced *with no limitation of its probative effect to that purpose*.

Conceding, however, that the language used was sufficient as an attempt to limit the effect of the affidavit as evidence, is it legally possible to make such a limitation? We submit it is not. 17 *Cyc.*, 465, states the general rule applicable here as follows:

"As a general rule, although a document is introduced to prove a particular fact, or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes. Nor, it is held, is a party entitled by an express qualification at the time of introducing a document to restrict its effect as evidence to a definite purpose; but he is compelled to offer it for what it is worth as evidence generally."

In *Reeves vs. Brayton* (S. C.), 15 S. E., 658, the court summarized the facts of the case as follows (p. 662):

"The plaintiff then introduced in evidence a certified copy of a deed, purporting to be the conveyance of the lot in controversy by Sarah B. Lewis, executrix, to Fanny Stohlbrand, bearing date February 27th, 1872, which purported to have been executed in the presence of B. I. Boone and G. M. Chapline in consideration of the sum of \$1,100.00 and to have been proved and recorded on the 6th of March, 1872, counsel saying: 'We offer that to show by what chain of title the defense claims bringing her within the rule as to common source.'"

Counsel for plaintiff then introduced another deed, saying this deed also was introduced for the same purpose as the former one. The deeds, however, were used for finding an entirely different fact from the one stated as the objective purpose of their introduction. To the claim that this was error the court answered (p. 665):

"But we think the rule is well settled that whatever may be the declared purpose for which a piece of evidence, either oral or documentary, may be introduced, it is entitled to have whatever effect it would have if no such purpose had been declared."

In *Sill vs. Reese*, 47 Cal., 294, 340, the defendant proved that the copy of a grant with attached bill of sale was in the handwriting of a certain person. The grant and bill of sale were tendered in evidence as establishing the existence of the originals during the lifetime of such person, and they were admitted over plaintiff's objection. The trial court considered these papers as establishing in defendant's favor facts having no connection with the purpose for which they were introduced. In holding that this was not an erroneous practice the Supreme Court of California said:

"We are not prepared to say that counsel is bound by the declaration of a limited purpose, so as to be estopped after the introduction of evidence, from drawing from it other deductions than that suggested by the terms of the offer. Certainly he should not be unless injustice has been done to the opposite party by permitting such new inferences; and this cannot be made out by mere assumption or conjecture unsupported by any fact appearing in the record. Indeed, counsel has no power to limit the effect of evidence; it would hardly be contended that the opposite party cannot use it in any legitimate manner before the jury. The statement of a 'purpose' is only a reason, addressed to the court why the particular evidence should be admitted; the effect of the evidence is to be limited, in proper cases, in the charge to the jury."

In *Sears vs. Starbird*, 78 Cal., 225; 20 Pac., 547, a judgment-roll was offered in evidence for the purpose of showing a specified fact. It was objected to as inadmissible for any purpose, but the court overruled the objection and admitted the judgment-roll in evidence. The appellate court said (p. 549):

"It is claimed, however, that the judgment-roll could not be used for the purpose of showing the amounts invested by the partner. The judgment-roll was offered in evidence by counsel for respondent without specifying in the offer the object of the evidence. Another objection was made on the ground that an appeal had been taken from the judgment

and on the ground that the questions involved therein were not the issues involved herein. Counsel then offered it 'for the purpose of showing that on the 8th day of February, 1888, a decree was entered in said action * * * dissolving the partnership * * * and ordering a sale of the partnership property.' Defendants objected on the ground that it was incompetent for any purpose. The court admitted it, reserving a decision and thereafter overruled the objection, and admitted it in evidence.

"The court was not bound to limit the evidence to any specified purpose under this offer and objection. In *Sill vs. Reese*, 47 Cal., 344, it was held that counsel is not bound by the declaration of a limited purpose so as to preclude him from drawing other deductions than that suggested by the terms of the offer, from the evidence offered, unless injustice would follow to the opposite party by permitting such new inferences. In the absence of an express understanding between counsel and the court that evidence is to be limited to a particular matter, the court will be authorized to consider it for any purpose for which it is competent and relevant to the issues."

To like effect is *Winants vs. Sherman* (N. Y.), 3 Hill, 74.

As has been pointed out, there was no obligation upon plaintiff to show that defendant had not filed the statutory affidavit or had filed a defective one. The statute, in effect, provides that the burden of proof shall be upon the original locator to show that he has performed the assessment-work unless he files the statutory proof of labor. To escape this burden he must show that he has filed such proof. If when he tenders the affidavit in evidence the relocater believes that it does not conform to the requirements of the statute, he may then object to its introduction and secure its exclusion from the case if, as a matter of law, the affidavit is defective. Any other construction of the statute would put upon the relocater a burden not contemplated by the act. If in a given case the affidavit were objectionable because of its failure to state with statutory certainty the facts that should

have been stated, and if the burden was upon the relocater to show the contents of the affidavit in order to prove its non-compliance with the statute, the object of the statute would be nullified, under the principle established in the cases cited, because the evidence adduced by the relocater to show a non-compliance with the statute would, while proving that fact, be evidence that the annual labor had in point of fact been done.

But even conceding the statute should be construed to impose upon the relocater the duty of proving that the statute had not been complied with, the plaintiff could have accomplished that result—conceding *arguendo* the correctness of the construction put upon the statute by the court below—by showing that the affidavit here filed was not recorded within the statutory period of time, and then resting his case. Having gone beyond the real needs of his case and introduced the whole affidavit with all of its facts for the purpose of getting the benefit of some of the language therein contained, he is certainly in no position to assert that the court should not consider the affidavit in so far as it is beneficial to the defendant company.

If, as has been shown, the affidavit were legally defective, and defendant company had sought to secure its introduction in evidence, it could have been excluded upon plaintiff's objection, and if actually admitted over plaintiff's objection and exception its admission would have been reversible error. If no objection to the introduction of the affidavit in evidence had been made by plaintiff, the affidavit would have been competent evidence of all facts therein recited. In the case in hand not only was the affidavit not objected to, but it was actually introduced in evidence by the plaintiff, and was read into the record with defendant's acquiescence. There is assuredly no difference between the introduction of the affidavit herein and the introduction by plaintiff of a deposition of defendant company taken by defendant in its own behalf in which plaintiff had not cross-examined the affiant.

Plaintiff Was Not Bound by Facts Recited in the Affidavit.

It should be remembered that after the plaintiff introduced the affidavit in evidence there was nothing to prevent him from introducing evidence tending to disprove the facts therein recited. Nevertheless in spite of the fact that plaintiff was seeking to have forfeited the rights of defendant, and in spite of the fact that plaintiff claimed to have been in possession of the adverse claims for a considerable period of time, engaged with a force of employees in performing labor thereupon, and hence had every opportunity for ascertaining whether defendant company had done the assessment-work required by statute, plaintiff did not introduce a *scintilla* of evidence to disprove the facts set out in the affidavit.

4 *Encyc. of Evid.*, 842, says:

"It quite frequently occurs that in order to establish a matter in dispute a party finds it necessary to introduce a document as the foundation of further proof relating to such document, in order to sustain the issue on his part. In such case he is not bound by such document so as to prevent him from introducing such further testimony relating thereto, though the evidence introduced may have the effect of discrediting the document."

In *Raymond vs. Nye* (Mass.), 5 Met., 151, plaintiff called for defendants' books of account, introducing them in evidence to show that the report of an auditor was incorrect, and claimed that from the books he was entitled to a credit not allowed by the auditor. Defendants contended that the books of account ought to be received in evidence *in toto* and that plaintiff ought not to be allowed to take advantage of the credit therein shown unless the debit side of the account were also admitted. The court said (p. 153):

"We understand instructions to the jury to have been, that the account books of the defendants, in-

roduced in evidence in the case by the plaintiff, were to be considered *prima facie* evidence only, of all charges therein appearing to have been made against the plaintiff and that it was open to him to control this evidence by other testimony; * * *

"This we think was the correct rule and has given to the evidence resulting from the books all the effect it was entitled to. Treating the evidence as admissions by the plaintiff, it was open to explanation, and liable to be controlled by other evidence."

Answering defendants' objection that the charge gave the jury to understand that the defendants were required to prove their account, notwithstanding the introduction of the books of account at plaintiff's instance, and so could not consider his case proved by plaintiff's act, the court said further (p. 154):

"But it is to be borne in mind that this ruling was preceded by the declaration that the plaintiff, by calling for the books and introducing them, had made them *prima facie* evidence, though not conclusive. The position assumed by the defendants at the trial before the jury was, that the charges against the plaintiff, contained in the books, must be allowed by the jury; and the only point in dispute seems to have been, whether greater weight should be attached to this evidence than to consider it *prima facie* evidence. If treated as evidence of this character, it still would avail the defendants, and required no further evidence from him, until it was disproved by the plaintiff."

It is submitted, therefore, that the finding of the court below (Finding V, R., 141) that the annual assessment work for 1904 was not done or performed by defendant company, based as it is solely upon the absence of evidence, other than that appearing in the affidavit of labor filed on June 8, 1905, as to this matter (R., 170) was an erroneous conclusion of the law as applied to the facts of the case, (1) because the affidavit was in substantial compliance with the local statute,

and (2) because its introduction by the plaintiff for a particular purpose made it evidence of all facts which it recited; and those facts show not only that the necessary assessment work was done, but that the value of the work done was very largely in excess of the statutory requirement.

D.

Plaintiff Had the Burden of Proving Defendant's Non-Resumption of Work Before the Relocations.

The burden was upon plaintiff to prove that the defendant company had not resumed work before he made the adverse locations, and the absence of all evidence on this question constitutes an impassable barrier to plaintiff's recovery in this action. In Findings XV and XVII (R., 153, 153-154) the court below recites the absence of all evidence on the question as to whether defendant company had resumed work before plaintiff's locations in question or not. It becomes important, therefore, to determine upon which of the parties the burden rested of proving that such work had or had not been resumed. If the burden was on plaintiff to show the non-resumption by defendant company of assessment-work before his locations in April, 1905, and May, 1906, then the absence of evidence on that matter is a fatal omission in the proof of plaintiff's case.

The statute (Rev. Stat., sec. 2324) provides that upon the failure of the original locator to perform the annual assessment-work the claim shall be subject to relocation by a third party "*provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location.*" In other words, the original locator's claims will not be affected under the Federal statute unless he fails to do the annual assessment-work required thereby *and* to resume work before the junior location is made. All the cases and authorities agree that

there can be no forfeiture for failure to do the annual assessment-work in the event that the owner *has* resumed work at the time of the relocation. It is equally clear from the language of the statute that notwithstanding the failure of the original locator to do the annual representation work, the adverse party has the right to relocate the claim *only* upon condition that the original locator has not theretofore resumed work. Cases have been cited in a previous part of this brief (*see supra*, pp. 15-18) which show that the courts with practical unanimity declare that forfeitures are not favored, and that upon the relocater rests the burden of proving every fact upon which the validity of his rights and the forfeiture of the rights of the original locator depend.

In his complaint the plaintiff, in recognition of the fact that the burden was upon him to prove defendant company's failure to do the annual representation work for 1904, and also its failure to resume such work before his locations in April, 1905, averred (R., 5):

"* * * that if said 'Hortense' and 'Aluminum' placer claims ever had any validity or legal existence the defendants and its grantors failed to do or perform or cause to be done or performed thereupon or for the benefit thereof or during or for the years 1904 or 1905 and each of said years, the annual labor and assessment work or improvements required by law in order to avoid a forfeiture thereof and thereby and because of such failure forfeited any rights they might have had in said claims and each of them and *"did not resume possession of the work upon the same at any time prior to the acquirement by the plaintiff and his grantors of the premises hereabove described."*

Inasmuch as the right to make a valid relocation can exist under the statute *only* in the event there has been no resumption of the annual work before the time of such location, the relocater must prove such non-resumption in order to establish the validity of his claim. If the relocater shows merely that there has been no annual assessment work done by the

original locator in the year preceding the relocation he has not shown his own right and the absence of any right in the original locator, unless he also proves that the original locator did not resume work before the relocation.

Such form of pleading was essential to the maintenance of the plaintiff's case. The mining law (sec. 2324, U. S. R. S.) in express language confers the right of relocation upon a third party *only* where the original locator has failed to perform annual assessment-work and has not "resumed work upon the claim after failure and before such location." These twofold requirements are found in the same sentence, and the existence of one is as essential as the existence of the other in order to give a third party the right of relocation. The use of the word "provided" in the statute does not create a technical "proviso." Performance of annual assessment work, and, failing that, resumption of work before attempted relocation, protected the original locator. The statute is thus well within the rule clearly stated in *Carroll vs. State*, 58 Ala., 401, that:

"It does not necessarily follow because the term *provided* is used, that which may succeed it is a proviso, though that is the form in which an exception is generally made to or a restraint or qualification imposed on the enacting clause. It is the matter of the succeeding words, and not the form, which determines whether it is or not a technical proviso."

Hence allegation and proof of the original locator's failure to do such work or to resume the same as indicated is indispensable to the maintenance of this action. The mere fact that the provision in regard to resumption of work before relocation follows the word "provided" is of no consequence, since, as held by this court in *United States vs. Whitridge*, 197 U. S., 135, 143, "the general purpose (of a statute) is a more important aid to the meaning than any rule which grammar or formal logic may lay down." Here the aim of the statute is to declare under what circumstances a claim

covered by an existing location shall be open to relocation. Its general purpose is to protect the original locator in his rights and the courts have accordingly construed it to require strict proof of all facts by which a relocation may be validated, imposing a heavy burden upon the relocater. It would certainly be consonant with this general purpose to construe the word "provided" in the statute to mean "and," thus fully protecting an original valid location in accordance with the equities of the respective parties. That the term "provided" is frequently used in that sense was ruled by this court in *Georgia Banking Co. vs. Smith*, 128 U. S., 174, 181, where it was said:

"The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater significance than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

We have no doubt that the plaintiff will contend that the proviso is in the nature of an exception to the terms of the principal clause of the act, and creates a defense which must be pleaded and proved by the original locator; that the relocater need show by a preponderance of the evidence only that the original locator has failed to do the annual work and labor, whereupon if the latter wishes to escape the consequences of such proof, he must show affirmatively that he has resumed work. But this depends upon the construction to be given to the statute. If the word "provided" as there used is merely equivalent to "and," as we contend it is,

then the proviso does not create a defense to be established by the original locator, but specifies an additional element which the relocater must prove to maintain the validity of his relocation.

In *Selma, Rome, etc., R. R. vs. United States*, 139 U. S., 560, an action was brought under the act of March 3, 1877 (19 Stat. L., 362), to recover for amounts due certain mail contractors as provided in that act. The act in question contained a proviso in this language "*Provided*, that any such claims which have been paid by the Confederate States government shall not again be paid." There was no proof in the case as to whether or not payment of the claim sought to be recovered had been made by the Confederate States. Plaintiff company "prepared the case and went to a hearing upon the theory that it was entitled to judgment, upon proof simply of the services rendered, unless the United States showed that the claim in suit had been, in fact, paid by the Confederate government" (p. 567). This court held that the burden was upon plaintiff to prove non-payment of the claim by the Confederate government, and that the absence of all evidence on this point necessitated a judgment for the defendant. To like effect see *Austin vs. United States*, 156 U. S., 417.

These cases show that a proviso such as the one in the statute herein involved does not create a defense to be taken advantage of in order to overcome a plaintiff's case proved in accordance with the requirements of the remainder of the statute, but relates to an essential element of plaintiff's case, strict proof of which by the plaintiff is necessary to entitle him to the relief he seeks.

Resumption of Assessment Work Does Not Restore a Lost Estate.

The question as to who must shoulder the burden of proving the resumption or non-resumption of work by the original locator must depend upon the question as to the legal

effect of such resumption upon the locator's rights. Does the failure of the original locator to perform the annual assessment-work *ipso facto* forfeit his legal right gained by location, which right is *restored* to him by his resumption of work before another location? Or, putting the same question in another form: Does the resumption before such location *restore* a right previously lost or does it operate to *continue* a right that has not been lost. If it *restores* a right previously lost, then when the relocater proves that the original locator has failed to do the annual assessment-work he has shown that the latter has lost his right acquired by original location, and the burden is upon the original locator to prove, by showing his resumption of work before relocation, the *restoration* in him or his reacquirement of that right. On the other hand, if the resumption of work before the relocation *continues* the right previously acquired by original location, then, unless the relocater proves both that the annual assessment-work was not done and that there was no resumption thereof before relocation, he has not shown that the original right has been forfeited or destroyed. In regard to the effect of resumption of work upon the rights of the original locator *Lindley on Mines* (2d ed.), section 651, says:

"Resumption of work at any time prior to the lawful inception of an intervening right *prevents* forfeiture. *It does not restore a lost estate.*" (Italics ours.)

The law, both as enacted by Congress and as construed by the courts, favors the original locator. Every presumption is indulged in favor of his rights under his original location, providing only he evidences his good faith by doing the statutory amount of annual labor. The original location and the rights flowing therefrom are never wholly forfeited until an adverse claimant secures patent to the premises. Until then the original location is dormant or suspended, but its vitality is never completely gone until patent is issued under a subsequent location. If it were otherwise and if the failure to

do the annual assessment-work *destroyed* the original location, then resumption of work after the expiration of the year would not re-establish the right of the original locator without a new location. Yet all the cases agree with the doctrine firmly settled in the leading case of *Belk vs. Meagher*, 104 U. S., 279, 282, that no new location is necessary, or, as stated in the case cited, that "if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, *the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act.*" A location is a grant from which flows the right to the exclusive possession of the premises located. As stated in *Belk vs. Meagher*, *supra*, 285:

"A location to be effectual must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession."

And again (p. 283):

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent."

From these principles it follows that no valid new grant of such rights to the same premises can be made unless the previous grant has become null and void, and the original grant is not so nullified until patent issues to an adverse claimant under a location junior in time. The vitality of the grant arising from an original location is illustrated by the following groups of cases (A being the original locator and B the relocater):

I. A fails to do the annual assessment-work. Before the end of the year B relocates and goes into possession. A fails to resume work. In a contest between A and B, A will prevail because B's relocation is invalid. *Belk vs. Meagher*, *supra*, pp. 284-285.

II. *Ibidem* as I except that A resumes work after default in the annual labor required and before B makes a second relocation. A again prevails over B. This is merely a variation of Group I.

III. A fails to do the annual assessment-work. B relocates after the year expires, but abandons his relocations or otherwise defaults. A then resumes assessment-work. C thereafter makes a second relocation. A prevails over C. *Justice Mining Company vs. Barclay*, 82 Fed. Rep., 554; *Klopfenstein vs. Hays* (Utah), 57 Pac., 712.

These cases, especially those falling in the group last mentioned, establish the continuing vitality of an original valid location. Certainly if in that group of cases the original location maintains its vitality, *a fortiori* must it do so in a case where, as here, there is merely an assumed failure to do the annual assessment-work, with no showing at all that there has not been a resumption before the time of the relocation; and since the original valid location is a grant of a present and exclusive right to possession that grant must continue with all the rights incident thereto until suspended by a subsequent relocation *before the resumption of work by the original locator*. If there is no showing that there has been a failure to resume, then the presumption must be that the original grant continues valid and with it the right to possession of the premises incident thereto. In other words, applying such rule to this case, the record here fails to show that the right to exclusive possession accruing to defendant company in virtue of its original valid location has been lost. It must follow, therefore, since the defendant's was the prior right, that the plaintiff, upon whom the law casts the burden of proving by a preponderance of the evidence a right to possession superior to that of defendant, has not established his case.

The rule of law here contended for is stated as follows in 1 *Snyder on Mines*, section 726:

"Forfeiture is never presumed. And in adverse suits, as in all actions involving the title to mining property, where one party relies on forfeiture or abandonment on the part of the other, the burden is upon him to establish such forfeiture or abandonment by clear and convincing proof. The reason of this rule is found in the universal doctrine of presumptions, expressed in either one of two ways, *duty done*, and that a condition once established is presumed to continue. *The proof is made as required above whenever it is shown by a preponderance of the evidence that the full amount of annual labor or improvements was not made or expended within a given year, and that advantage was duly taken of the failure before restoration by resumption of work.*"

In *McWilliams vs. Winslow*, 34 Colo., 341; 82 Pac., 538, 539, plaintiffs brought suit in support of their adverse to defendant's application for patent. So far as the report of the case shows the only matter established by the evidence was that plaintiff's location was prior in time to that of defendant. The court said (p. 539):

"The location or relocation of a mining claim can only be made upon unoccupied and unclaimed public domain, and it was incumbent upon plaintiffs to show, as one of the material facts necessary to establish the validity of their location, that the ground they sought to locate was unoccupied and unappropriated public mineral domain, subject to location."

Applying the principle of this case to the case in hand, the question is: Has the plaintiff proved that at the time of his relocation the premises in controversy were "unoccupied and unappropriated public domain?" and this in turn depends upon the question: Would the premises have been unoccupied and unappropriated at the time of the relocation if defendant company had, as a matter of fact, resumed work prior thereto? The second question must, we submit, be answered in the negative, and hence it fol-

lows that the first question must also be answered negatively. This line of reasoning inevitably leads to the conclusion that proof of non-resumption of work by defendant company was a burden resting upon plaintiff.

In *Power vs. Sla*, 24 Mont., 243; 61 Pac., 468, defendant filed a "cross-complaint" alleging title to the disputed premises to be in him by virtue of a relocation made after plaintiff's default. The cross-complaint distinctly alleged the failure of plaintiff to perform the annual *work and labor* during the year preceding the relocation and also plaintiff's failure to resume work before such relocation, but did not aver a failure on plaintiff's part not only to perform the *annual work and labor* but also to make *improvements* of the statutory value (Rev. Stat., sec. 2324). The court, holding that there is a distinction between "work" and "labor" and "improvements" ruled that defendant should have negatived the making of *improvements* as well as the doing of *work and labor*, since under the statute either was sufficient to prevent a suspension of rights under an original valid location. The court said (p. 471):

"The plea of forfeiture is in the nature of a confession and avoidance. It admits a prior right in the plaintiff, which would have continued but for the entry and location by the defendant, which, under the mining law, has terminated it. *Morenhaut vs. Wilson*, 52 Cal., 263. One who relies upon such a plea, must set forth the facts upon which he relies to overturn the prior right of his adversary, and establish them by clear and convincing proof. *Renshaw vs. Switzer*, 6 Mont., 464; 13 Pac., 127; *Wulf vs. Manuel*, 9 Mont., 286; 23 Pac., 723; *Mattingly vs. Lewisohn*, 13 Mont., 508; 35 Pac., 111; *Strasburger vs. Beecher*, 20 Mont., 143; 49 Pac., 740; *Hammond vs. Milling Co.*, 130 U. S., 291; 9 Sup. Ct., 548; 32 L. Ed., 964. *He assumes the burden of pleading and proving that the prior owner has done none of the acts which, under the statute, he may do to preserve his right.*"

In the instant case the defendant company as owner under the original locators might have prevented the suspension of its rights under its location by resuming work before plaintiff's attempted relocation. Hence in the language of the opinion quoted from, this was one of the things that defendant might have done to preserve its rights. Since, therefore, the plaintiff assumed "the burden of pleading and proving that the prior owner (defendant company) has done none of the acts which, under the statute, he (it) may do to preserve his (its) rights" it follows that although the allegations of the complaint are sufficient because they distinctly negative the resumption of work by defendant company (R., 5) there is a fatal defect in the proof in that it fails to show such non-resumption.

The New Mexico Statute Does Not Relate to Burden of Proving Resumption of Assessment Work.

This result is not affected by the local territorial statute (Comp. Laws of 1897, sec. 2315) quoted *supra*. (See pp. 6-7.) That statute places upon the original locator the burden of proving the performance of the *annual labor* if he fails to make properly recorded proof thereof. The statute is in derogation of the common law, as has been shown, and if rightly construed by the court below tends to create a forfeiture of the original locator's rights. Under well-established principles of statutory construction, it should, therefore, be interpreted so as not to enlarge the scope of the forfeiture therein provided for beyond the letter of the statute fairly construed. Certainly the statute fairly construed can be held to affect the burden of proof only in regard to the performance of the annual labor since that is all that is included within its express language. The difference between preventing a suspension of the rights accruing to an original locator, by the performance of the annual work and labor required by the Federal statute, and the re-establishing of

those rights by *resumption* of work in any year following a default, but before relocation by some third party, is plain from the language of the statute, is well understood in all mining localities, and could not possibly be confused by any State or territorial legislature. By such resumption of work the original locator does not pretend to be performing the work and labor as to which he has defaulted in the previous year; he is merely evidencing thereby in good faith his intention not to abandon the claim but to hold the same. If he were attempting to make up for his prior default, then in order to hold his claim during the year of resumption of labor, it would be necessary for him to perform not only the \$100 worth of labor omitted to be performed in the year of his default, but also an additional \$100 worth of labor due for the year in which the resumption occurred. There is no case which so construes the law.

That the New Mexico statute in question has no relation to the burden of proving resumption of work after failure to perform the annual labor is clear from its terms. The affidavit therein described is required to be filed "within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed." There is no time specified in the statute or prescribed by custom within which work must be resumed after default in performance of the annual labor. Such resumption may occur in *any* year following such default provided no adverse right intervenes. If, therefore, the territorial statute be construed to provide that the burden of proof shall shift to the original locator upon failure to file a proper affidavit of the resumption of work within the time allowed by law, then the purpose of the statute is rendered nugatory, since such construction in effect makes the statute say that the locator is not required to file the affidavit during *any* given time.

The difference in the treatment of proof of annual labor and proof of resumption of labor, by the local statute has

a substantial reason as its basis. It may often be difficult for one who has not remained in the vicinity of a mining location upon which annual labor has been done to ascertain the amount and value of such labor or the time of its performance. Frequently, before the enactment of the statute here in question, relocations were made in good faith by persons who believed the annual work had not been done, when in point of fact, it had been performed, and the result was unnecessary contest and litigation. Frequently it was impossible, and in no cases more often than in cases where placer claims like those involved herein were in controversy, to determine, even by a close examination of the ground, whether any work had or had not been done, since often all *surface* evidence of picking and shoveling, of which such annual labor almost entirely consists, is quickly obliterated by the elements and other causes. However, proof of that class of facts is within the reach of the original locator, and the advantage which the relocater would gain in having this uncertainty removed, perhaps justified the territorial legislature in putting an additional burden upon the locator if it be conceded that doing so would not produce a conflict between the Federal and the local statutes. But the situation with regard to proof of resumption of work by the original locator is entirely different. Knowledge of the resumption or non-resumption of work by the original locator, after his failure to perform the statutory annual labor, is readily accessible to the relocater, and there is no good reason, therefore, why the law, favoring as it does the owner of a valid location, should place an additional burden upon the original locator, to the advantage of the relocater, who might just as easily discharge such burden and upon whom the burden would rest at common law.

It is submitted, therefore, that the burden of proving non-resumption of labor by defendant company was upon the plaintiff and that that burden was not affected by the local statute. If this conclusion is sound, as we contend it is,

then the plaintiff has not proved his right to the possession of any of the tracts to which he asserts a right, because the findings of fact by the court below (Nos. XV and XVII, R., 153, 153-154) expressly state that there was no evidence adduced to show whether or not defendant company had resumed work before plaintiff's locations in April, 1905, and his locations and relocations in May, 1906.

II.

The court below erred in holding that the location by plaintiff of the Lynch, Tip Top, and Aurora claims, and the relocation of the Agnes and Lulu claims in May, 1906, were valid, notwithstanding that there was then uncanceled defendant's valid entry of October 23, 1905, for the Hortense and Aluminum placers embracing said claims.

The court below found that on August 2, 1905, defendant company made application to the local land office at Las Cruces, New Mexico, for patent to the International, Hortense and Aluminum placer claims, within the confines of which last two placers the tracts to which plaintiff asserts a right, are located, and that defendant paid the necessary purchase money for which, on October 23, 1905, the receiver issued to defendant a final receipt. Thereafter on September 4, 1906, subsequent to plaintiff's locations in May, 1906, the Commissioner of the General Land Office held defendant's entry for cancellation. An appeal to the Secretary of the Interior resulted in the affirmance of the Commissioner's decision on September 9th, 1908 (Finding VIII, R., 144-149). Hence it was not until more than two years after plaintiff's locations in issue that defendant company's entry was finally held for cancellation. Such cancellation was ordered because the affidavit of the posting of notice on the premises of application for patent thereto was executed outside of the land district in which the premises were situated. The Sec-

retary found as a fact that notice had been properly posted. He said (R. 145):

"The proof of posting referred to consists of the affidavits of two persons, as having been present on June 10, 1904, when the plat and notice were posted upon the claims in a conspicuous place, which is described with definiteness and particularity, but such affidavit was executed before a notary public in the State of Texas, as above stated.

"The plat and notice remained posted until October 20, 1905. Publication began August 11, 1905, and was continued for the full period of sixty days, concurrently with posting on the land and in the local office."

After the rejection of the entry by the Commissioner a rule was issued to show cause why the entry should not be cancelled. In answer, properly verified affidavits of posting were submitted but without avail. It thus appears that defendant company's entry was directed to be cancelled solely because of the claimed insufficiency of the affidavit of posting of notice on the premises. It is conceded that there was in fact a proper posting on the premises and that publication was made by the local officers in the usual manner. Hence, so far as third parties were concerned the proceeding was in every respect regular, and they received all the notice they would have received had the affidavit by which the proceedings were initiated been verified within the land district. And the plaintiff might have, though in fact he did not, adversed defendant's application under his relocations in April, 1905. The insufficiency of the affidavit, if any, operated to the prejudice of no one having a claim to the premises embraced in defendant's application. It is submitted that plaintiff's locations in May, 1906, were and are invalid (A) because defendant company's entry was then outstanding and uncanceled, and no valid relocation could be made until the cancellation thereof; and (B) because the decisions of the Commissioner of the Land Office and the

Secretary of the Interior, holding defendant company's entry for cancellation, were erroneous. If proposition (B) *supra* is sound, as we shall show it to be, then all of plaintiff's locations, both those in April, 1905, and those in May, 1906, are invalid, and defendant company is entitled to proceed in the Land Department on its entry of October 23, 1905, and perfect its claim to the premises thereby embraced.

A.

Defendant's Entry of October 23, 1905, Segregated the Land Embraced Therein from the Public Domain.

It is submitted that defendant company's entry of October 23, 1905, operated to withdraw the lands embraced thereby from the public domain and hence no valid relocation could be made of any of such lands until cancellation of the entry, and that such entry was not void *ab initio*, but merely voidable as against the United States. Hence until avoided by the United States, the entry must have vested in defendant company the equitable title to the premises as against the United States and the premises were not, therefore, part of the public domain open to location or other disposition under the law.

Defendant's Entry Was at Most Only Voidable and Was Not and Could Not Have Been Held Void.

That the Secretary of the Interior did not intend to hold, by cancelling the entry, that a valid location could be made by third parties in the interim between the making of the entry and its cancellation is clear from the fact that he expressly calls to the attention of the Commissioner of the General Land Office the fact of the allowance by the local officers of agricultural entries for lands embraced in defendant company's entry. He said (R. 149):

"It should be pointed out, however, that from the record, before the department, it appears that three homestead entries (Nos. 4723—and 4931, Las Cruces series) were inadvertently allowed of record in the year following the making of the mineral entry, each one in part in conflict therewith. One of these entries (No. 4724), was the second homestead filing and was allowed by the local officers in the absence of the authorization of your office and of the necessary showing required in cases of second entries."

Even admitting that the Secretary meant to hold that defendant company's entry was void, then we submit that this holding was not necessary or essential to his decision which was simply that the entry had been allowed on insufficient proof and should hence be cancelled. The effect of defendant company's entry as withdrawing the lands thereby embraced from the public domain and preventing the acquirement of rights by third parties prior to its cancellation was not before the Secretary for decision, but is now presented for the first time to be decided by the courts and not by the Secretary. The Land Department has jurisdiction to dispose or refuse to dispose of public mineral lands to individuals, but it has no jurisdiction to determine rights to possession of mineral ground between an applicant and a third party, especially where as here such third party does not assert an adverse claim in the proceeding on the application for patent. The contention of defendant company that the Secretary's decision directing the cancellation of its entry did not and could not validate rights sought to be acquired in the interim between the allowance of the entry and its cancellation is hence not an attempt to impeach that decision collaterally. In *Smelting Co. vs. Kemp*, 104 U. S., 636, 646, this court said, regarding the collateral attack of a patent issued by the Land Department:

"On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had

no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others."

See also *Knight vs. United States Land Assn.*, 142 U. S., 161, 211-212.

All that the Land Department had before it in defendant company's proceedings for patent on its entry was the validity of that entry as against the United States. What its effect may have been on third parties was not and could not have been before that Department for decision. The lands covered by the entry were admittedly subject to disposal under the mineral laws. Hence within the holding of the case of *Smelting Co. vs. Kemp*, *supra*, the Land Department, including the subordinate officials thereof, had jurisdiction over such lands and the decision of the Secretary of the Interior on defendant company's application for patent could not have declared the entry therefor to be absolutely void. At most it was and could be held to be *voidable* only.

In *Southern Cross Gold Mining Co. vs. Sexton*, 147 Cal., 758; 82 Pac., 423, the published notice of defendant's application for patent erroneously described the premises covered by the entry. In July, 1895, the Commissioner ordered republication of notice with proper description of the premises and such notice was republished in accordance with the Commissioner's order from December, 1900, to February, 1901. Plaintiff relocated the ground in July, 1900, and in November, 1901, moved the Department to cancel defendant's entry. The Commissioner denied the motion but the Secretary reversed the Commissioner and directed the cancellation of the entry, saying (p. 424):

"The original notice being fatally defective, it was rejected for that reason. Under the law, when the notice fell, the entry fell also. It no longer had any basis to support it. It must be treated, therefore, as

though it had been cancelled of record at the time the notice was finally adjudicated to be insufficient. The adjudication of the insufficiency of the notice was equivalent to a determination that the entry had been erroneously allowed, and should be canceled."

This retroactive cancellation of defendant's entry would have validated plaintiff's relocation in July, 1900. In holding that such retroactive cancellation could not be made the Supreme Court of California said (p. 424):

"We think the honorable Secretary was without power to order a retroactive cancellation, so as to cut out the right of the original entryman who was without fault, and to clear the way for the jumping of his claims by one who had not only never asserted an adverse claim at the time of the original entry and application, but who makes his entry 15 or more years later, basing his right wholly upon the default of the appellants to perform annual labor."

There is No Difference Between an Agricultural and a Mineral Entry as Withdrawing Lands Covered Thereby from the Public Domain.

The court below conceded that the effect of an entry for agricultural lands is to withdraw the same from the public domain but denied that an entry for mineral lands can have that effect. This distinction between the operative effect of an agricultural and a mineral entry was made on the ground "that by entry and *by entry alone* are rights initiated to agricultural lands" (R., 168), whereas such rights to mineral lands are initiated by location. The premise of the court's distinction, however, that rights to agricultural lands can be initiated only by entry, is erroneous. Such rights may be initiated by actual settlement on the land as well as

by entry therefor, and settlement upon agricultural public lands is analogous to location of mineral lands.

Clements vs. Warner, 24 How., 394, 397.

Shepley vs. Cowan, 91 U. S., 330, 337-338.

Ard vs. Brandon, 156 U. S., 537, 541-544.

Northern Pacific R. R. Co. vs. Amacker, 175 U. S., 564, 567-568.

Tarpey vs. Madsen, 178 U. S., 215, 220-222.

Brandon vs. Ard, 211 U. S., 11, 18-19.

Weyerhaeuser vs. Hoyt, 219 U. S., 380, 388-389.

In *Clements vs. Warner*, *supra*, this court said:

"The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

The following is from the opinion of the court in *Shepley vs. Cowan*, *supra* (pp. 337-338):

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes affect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

* * * * *

"But whilst, according to these decisions, no vested right as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United

States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

And in *Ard vs. Brandon*, *supra*, p. 543, the court said:

"The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question of whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application."

It is obvious, therefore, that the distinction drawn by the court below between an agricultural and a mineral entry is based upon an unsound premise, and is hence erroneous. Settlement upon public agricultural lands vests in the settler a right to the lands settled upon superior to that of any subsequent settler or applicant just as a valid location gives to a locator a right to the possession of the lands embraced thereby superior to that of any subsequent relocater.

Authorities Hold that a Mineral Entry Withdraws Lands Embraced Thereby from Public Domain.

That an outstanding and uncanceled mineral entry withdraws the land covered thereby from the public domain so as to invalidate any relocation made before its cancellation is universally held by the courts, the United States Land Department, and text-writers.

Lindley on Mines (2d ed.), secs. 637, 717.

Barringer & Adams, The Law of Mines and Mining, 265.

Snyder on Mines, sec. 493.

- American Hill Q. M.*, *Sickle's Min. Dec.*, 377, 383;
 S. C. Com'r's Decision, *id.*, 384.
F. P. Harrison, 2 L. D., 767, 769-771.
Smuggler Mining Co. vs. Trueworthy Lode Claim,
 19 L. D., 356, 359.
David Foote Lode, 26 L. D. 196.
Nielson vs. Champagne Mining & Milling Co., 29 L.
 D., 491, 493.
McCormack vs. Night Hawk, etc., Co., *ibidem*, 373,
 377.
Marburg Lode Mining Claim, 30 L. D., 202, 205.
Benson Mining Co. vs. Alta Mining Co. 145 U. S.,
 428, 431-432, 434.
Aurora Hill, etc., Co. vs. 85 Mining Co., 34 Fed. Rep.,
 515.
Neilson vs. Champagne Mining & Milling Co., 111
 Fed. Rep. 655, 657.
Teller vs. United States, 113 Fed. Rep., 273, 281-282.
Cranes Gulch Mining Co. vs. Scherrer (Cal.), 66 Pac.,
 487, 488.
Southern Gold Cross Mining Co. vs. Sexton (Cal.), 82
 Pac., 423.
Batterton vs. Douglas Mining Co. (Utah), 120 Pac.,
 827.

The applicable doctrine is well stated in the opinion of Secretary Schurz in the case of the *American Mill Q. M.*, *supra*. The Secretary said:

"The true rule of law governing entries of public land, to which mineral lands form no exception, is, that when the contract of purchase is completed by the payment of the purchase money and the issuance of the patent certificate by the authorized agents of the Government, the purchaser at once acquires a vested interest in the land, of which he cannot be subsequently deprived if he has complied with the requirements of the law prior to entry, and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. In

such cases there is part performance of a contract of sale, which entitles the purchaser to a specific performance of the whole contract without further action on his part. When the proofs are made and the purchase money paid, the equitable title of the purchaser is complete, and the patent when issued is evidence of the regularity of the previous acts and relates to the date of the entry to the exclusion of all intervening claims. *In short, an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned.*" (Italics ours.)

In *Teller vs. United States, supra*, the court said:

After the locator shall have applied for a patent, in the event in the exercise of his option he sees fit to do so, and after he shall have fully perfected his entry upon the land by the payment of the purchase price, and not till then has the land ceased to be a part of the public domain, and not till then has he acquired any vested right to the absolute title. *Witherspoon vs. Duncan, supra*. When such an entry is made, the land is not only withdrawn from the public domain, but the entryman has acquired an equitable title, and thereafter, and not till then, the United States holds the legal title in trust for him."

This court stated the doctrine as follows in *Benson Mining Co. vs. Alta Mining Co., supra*, p. 434:

"There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no party can acquire from the Government interests as against him."

In *Neilson vs. Champagne Mining and Milling Co., supra*, the court referring to the case just quoted from, said (page 657):

"This case decides the whole question presented in this bill, which is that after entry in the land

office a relocation of the premises cannot be made so long as that entry stands. The only remedy for the parties is to induce the Government to proceed towards setting aside the entry."

In *Aurora Hill, etc. Co. vs. 85 Mining Co., supra*, plaintiff claimed under a location made in 1877 and an entry made in 1880. The papers relating to plaintiff's application for patent were forwarded by the local officers to the Commissioner of the General Land Office. The latter in 1882, 1885 and 1886, called upon the local officers for additional proof of the posting of notice and plat on the claim. In 1887 an affidavit of posting was sent to the Commissioner. No assessment-work was done by plaintiff in 1884. Defendant claimed under a location made on January 1, 1885. It was held that defendant had no claim to the land. The court said (p. 519):

"In the case at bar, plaintiff, through its grantors, has surely 'secured a patent,' or its equivalent, so long as the entry and certificate of purchase are uncanceled."

And again (pp. 520-521):

"Defendants were trespassers—mere intruders—upon plaintiff's lawful possession when they attempted to relocate this mine. Having no right to enter upon that possession, they could initiate no right in themselves by their attempted relocation of the mine. The right to locate, or relocate, a mining claim depends upon the right to enter upon the land where the mine is situated at the time the location is made. Without such right of entry the location is void. Location confers no right of entry unless such right of entry existed at the date of location."

Applying the principle of the case last cited to the case in hand it is apparent that at the time of plaintiff's locations in May, 1906, his entry upon the premises embraced in defendant company's prior entry of October, 1905, was a trespass

and hence his locations then made conferred upon him no rights.

It is well settled since the decision of this court in *Belk vs. Meagher*, 104 U. S., 279, that a relocation made before the expiration of the year, in which the original locator may do the assessment-work, is invalid and does not become valid by the mere lapse of the year and the failure of the original locator to do the necessary work. If under the circumstances supposed, the relocater wishes to protect himself he must make a new relocation after the expiration of the year and before resumption of work by the original locator. If a valid relocation cannot be made before the expiration of the year in which the assessment-work is due, how much more must it be true that such relocation cannot be made after the original locator has made application for purchase, paid the price, received a receipt therefor, and his payment has been entered of record; and how much more must it also be true that a relocation of mineral land, made pending a determination of the validity of the purchase, does not become the basis of any rights in the relocater upon cancellation of the purchase. Any claim against a locator so applying for purchase must be made within the prescribed time after publication of the application for purchase, and a failure to adverse terminates, as against such applicant for purchase, all outstanding rights. The courts uniformly hold, as the cases above cited show, that the right to a patent through purchase under the mining laws, is equivalent to a patent and relieves the purchaser from the necessity of doing further assessment-work. What would be the result of a decision recognizing a relocation of mineral land already embraced in a purchase actually made and awaiting the final determination of the Land Department? A premium would be offered to the jumper, for obviously no one can anticipate the final decision of the Land Department. Furthermore, such a decision would nullify the practically universal ruling of the courts that assessment-work need not be done after purchase. Who would care to

take a chance? Would not the locator be better off if he relied only upon his valid location and performed the necessary assessment-work year by year, rather than if he applied for the purchase of his claim, which application if rejected for some mere technical defect, as was the case here, would subject his claim to relocation pending a determination by the Department of the validity of his purchase? Would not such consequences put an effective check upon the disposition of the public mineral lands and retard thereby the development of the nation's mineral resources?

In 1901 the Land Department promulgated the following rule (31 L. D., 482, par. 44) :

"Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice."

If under this rule an application cannot be filed for patent to lands embraced in a pending application, then we submit a valid location upon which such application would necessarily be predicated, cannot be made in respect to lands covered by such a pending application.

In two well-reasoned cases, *Germania Iron Co. vs. James*, 39 Fed. Rep., 811, and *James vs. Germania Iron Co.*, 107 Fed. Rep., 597, involving a similar rule of the Department regarding the disposition of homestead lands, the Circuit Court of Appeals for the Eighth Circuit ruled that rights could not be acquired to land embraced in an entry until cancellation thereof. In the latter case, the court said (p. 603) :

"Turning now to the question at issue, the following propositions will be found to be established beyond controversy; the entry of the land by Stram with his half breed scrip, whether valid or void, segregated it from the public domain, and appropriated it to private use, so that no legal entry of it could be made by James, or by any other applicant, before the local land officers received notice of the decision of the Secretary and canceled it on their books and plats."

The court below, attempting to answer these cases which were there cited and discussed in defendant company's brief, said (R., 167):

"The pendency of a void entry segregates the land from the public domain, for this reason that until it is cancelled there is no method of procedure whereby anyone may initiate a right to the land because the right is initiated by entry alone and by entry in the local land office."

This conclusion of the court is again predicated upon the fallacious premise that rights to agricultural lands may be initiated only by entry, whereas, in point of law, settlement upon unappropriated agricultural lands, though not indispensable, confers on the prior settler the better right, just as in the analogous case of a prior location of mineral lands. If before the cancellation of an outstanding agricultural entry some third party should settle upon land embraced thereby, can there be any doubt that such settler would acquire no right to such land upon cancellation of the entry, unless the settlement was actually continued after such cancellation? If it is true, as we submit it clearly is, that no right would vest in a settler whose actual occupation was not continued after cancellation, then is it not also true that a relocation of mineral land embraced in a pending entry confers no rights upon cancellation without a new location thereafter made.

That an Agricultural Entry Segregates Land from the Public Domain is Well Settled.

That agricultural lands embraced in an uncanceled entry are not subject to appropriation by a third party until cancellation of the entry is well settled. The entry operates to withdraw such lands from the public domain and hence until cancellation thereof other disposition of the lands cannot be made.

Graham vs. Hastings & Dakota Ry. Co., 1 L. D., 362, 364.

St. Paul, M. & M. Ry. Co. vs. Forseth, 3 L. D., 446, 447.

St. Paul, M. & M. Ry. Co. vs. Leech, 3 L. D., 506, 507.

Witherspoon vs. Duncan, 4 Wall., 210, 219.

Simmons vs. Wagner, 101 U. S., 260, 261.

Hastings & Dakota R. R. Co. vs. Whitney, 132 U. S., 357, 363-364.

Whitney vs. Taylor, 158 U. S., 85, 90-93.

Parsons vs. Venske, 164 U. S., 89, 92.

Graham vs. Hastings & Dakota Ry. Co., *supra*, Secretary Teller quotes with approval the Attorney-General's opinion to the following effect:

"When an entry thereof is made under those laws (whether pre-emption, homestead, or other), the particular land entered thus becomes segregated from the mass of public lands, and takes the character of private property. 'In no just sense,' observe the supreme court in *Witherspoon vs. Duncan* (4 Wall., 218), 'can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before entry, after it they are private property.' " (Opinion of the Attorney General, 8 *Copp's Land Owner*, 72.)

And then adds:

"In the light of the judicial interpretation of the term 'entry' as it is used in the public land laws, I am constrained to the opinion that an entry of record, *which on its face is valid*, is such an appropriation of the land covered thereby as to reserve the same from the operation of any subsequent law, grant, or sale, until a forfeiture is declared and the land is restored to the public domain in the manner prescribed by law."

In *Parsons vs. Venske, supra*, an entry is said to be a contract. *Like all contracts for the sale of lands, it must convey the equitable title to the intended purchaser.* Certainly there is no difference between an agricultural and a mineral entry in this respect. If, therefore, defendant company by its entry in October, 1905, acquired the equitable title to the mineral lands covered thereby, the legal title at all times remaining in the United States until patent, the entire title to the lands and all rights therein were exhausted in the respective interests of defendant company and the United States, and until defendant company's equitable interest in the land was in some manner terminated it was legally impossible for any third party to acquire an interest therein by a relocation. Any attempt to do so was necessarily a wrong to defendant company as the equitable owner of the premises, and was ineffectual to vest any rights in such third party. It is well settled that a valid location is a grant of an exclusive right to possession; that an entry passes the equitable title to the land thereby embraced, and that a patent conveys legal title to such lands. WITH EACH STEP IN THE ACQUISITION OF FULL TITLE TO MINERAL LANDS THE APPLICANT THEREFOR OBTAINS A LARGER RIGHT INTO WHICH HIS PREVIOUS RIGHT IS MERGED. Thus the equitable title acquired by entry swallows up the exclusive possessory right flowing from a valid location; and both such equitable title and exclusive possessory right are merged in the legal title upon the issuance of patent. From this it

follows that as long as the exclusive possessory right is not terminated the acquisition of such right in the same land by a third person is legally impossible. So also, as long as the equitable title is outstanding the acquisition of a possessory or equitable right by another is impossible. Likewise, upon issuance of patent the acquisition of a possessory, equitable or legal title to the premises by a third party is an impossibility until the legal title flowing from the outstanding patent is first avoided. This, we submit, demonstrates that the locations made by the plaintiff in May, 1906, while defendant company's entry was outstanding and uncanceled, could confer no rights upon plaintiff.

Leading Cases on Impossibility of the Acquirement of Rights in Mineral Lands Withdrawn from Public Domain by Entry or Otherwise.

Brown vs. Gurney, 201 U. S., 184, sustains our contention that an entry withdraws the mineral land embraced thereby from the public domain until it is canceled. In that case it appeared that the Cripple Creek Mining Company made a lode location of the Kohnyo claim, divided into two non-contiguous tracts by an intervening placer claim. On the north end of the Kohnyo, consisting of 500 feet of the claim, the discovery of mineral had been made and the discovery shaft and other workings and improvements were located. The south end of 700 feet did not show mineral and had not been developed. The Cripple Creek Company made an entry for the entire Kohnyo claim, consisting of the two tracts, which entry was allowed by the local officers. The Department refused to issue patent to the company on the ground that two portions of a lode mining claim separated by a patented placer, could not be included within one patent. The company was given the privilege of electing either of the claims for patent, and in default of election within sixty days the entry was to be canceled so far as the southern portion of the claim was concerned. The decision

was made May 28, 1895. The company then began proceedings against the claimant of the intervening placer in order to secure title to the vein of the Kohnyo, which it was asserted passed through the portion of the placer claim in conflict with the Kohnyo location. The Land Department, before which the proceeding was prosecuted, decided adversely to the company's claim of a known vein in the placer conflict. This decision was dated May 7, 1898. On June 14 following the company filed its written election, dated June 10, by which it elected to retain and patent the north end of the Kohnyo claim. On July 15 the Commissioner canceled the entry as to the southern portion of that claim. May 13 Brown located this portion of the claim as the Scorpion lode. June 23 Gurney made a location of the same ground as the Hobson's Choice lode. July 16 Small made his location of the ground as the P. G. lode, and on July 15 and 16, Brown filed amended and second amended certificates. It was held that Gurney's location on June 23, though made before the formal cancellation of the Cripple Creek Company's entry, gave him the superior right because the company's election of June 14 constituted an abandonment by the company of the southern portion of the Kohnyo claim, restoring the same to the public domain, and Gurney's was the first location made thereafter. At the same time, however, the court held that Brown's location of May 13, while the ground was still embraced within the Cripple Creek Company's entry, before its cancellation by the Department or abandonment by the company, conferred on him no rights, notwithstanding that under the law a patent could not issue in favor of the company to the entire Kohnyo claim. And this holding sustains defendant company's contention that the plaintiff's locations in May, 1906, were invalid because of its outstanding and uncanceled entry. The court said (pp. 191-194):

"Of course it is essential that at the date of a location the ground located on should be part of the public domain, and in the present case the specific

question affirmatively raised was whether the ground in controversy was a part of the public domain at the time of the respective contested locations.

"It seems to us that when the Scorpion locator attempted to make that location he conceded the validity of the Kohnyo location and the segregation by that location from the public domain of the southerly portion of that claim, but assumed that the decision of the Secretary of May 7th, 1898, operated to restore that tract to the public domain as of that date, since he relocated it on May 13, and on the following fifteenth of July, filed an amended location. But the filing of the latter certificate did not cure the defect arising from the fact that the discovery shaft of the Scorpion was upon ground covered by the Kohnyo's claim, and the filing of the amended certificate could not perfect the Scorpion location in view of the previous location of the Hobson's Choice, which created intervening rights in favor of a third person.

* * * * *

"The election, then, by the Kohnyo claimant, filed in the Land Office June 14, 1898, was an abandonment of the south seven hundred feet of the Kohnyo claim, which took effect *eo instanti*. Lindley §§ 642, 643, 644; *Derry vs. Ross*, 5 Colorado, 295, 300. This was voluntarily done, and took effect notwithstanding the receiver's receipt had not been formally canceled. The order of cancellation of July 15 simply recorded a pre-existing fact, and did not change the effect of the previous abandonment. By reason of that abandonment the southerly tract, for the first time, reverted to and became a part of the public domain. And as the Hobson's Choice was the first location of the ground made after such abandonment, it follows that it was valid, and that its owner was entitled to a decision in its favor.

"We again state the dates of the respective locations. The Scorpion was located May 13, 1898. The Hobson's Choice was located June 23, 1898. The location of the P. G. was July 16th. Thus it is seen that the Scorpion was attempted to be located at a time when the premises were not subject to location;

that the Hobson's Choice was located when the premises had reverted to the public domain; and that the location of the P. G. was after that date.

* * * * *

"The final certificate issued by the receiver after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent.

* * * * *

"It was only when the Kohnyo claimant abandoned that tract by making its election that it waived its right to patent it, and permitted the receiver's receipt to be cancelled to that extent.

"That cancellation did not itself operate to restore the southerly tract to the public domain, which had already taken place by the action of the Kohnyo claimant in compliance with the judgment of the Land Department."

The decision of this court in *Brown vs. Gurney*, when analyzed, not only fails to sustain the validity of plaintiff's locations in May, 1906, but affirmatively establishes their invalidity.

The case of *Murray vs. Polglase* (Mont.), 43 Pac., 505; 59 Pac., 439, deserves close scrutiny. That was an adverse claim suit. Murray had made a location of the Maude S. claim in May, 1881. He failed to do the annual work for 1887 and 1888, but made a final entry of the land on December 29, 1887. Defendant's location was made on January 1, 1888, as the Ramsdell lode. Plaintiff's entry was cancelled on June 1, 1892, for fraud in representing to the local officers that the statutory amount of work had been done. Adams *et al.* intervened in the case claiming under a location of the ground on January 31, 1894, as the "Adverse Lode Mining Claim." Adams contended that his location was superior to any right of plaintiff because the latter had failed to do annual work from 1888 to 1893, or to resume before January 31, 1894, and that his right was

better than defendant's because the latter's location was made when plaintiff's entry for the land was outstanding. The trial court sustained the claims advanced by Adams. But the Supreme Court of Montana held that the intervention of Adams *et al.* was not proper under the local statute. The case was thus reduced to a contest between the original locator, Murray, and the relocater, Polglase, claiming under a location made while the former's entry, procured by fraud, was outstanding and uncanceled. Under these circumstances the court held that plaintiff's entry, induced by fraud was in law no entry and hence did not segregate the lands covered thereby from the public domain. But the court expressly conceded that an entry procured in good faith operates as a segregation of the land embraced therein from the public domain. Such was defendant company's entry in this case, consummated in October, 1905. In the Polglase case the court quoted from the opinion of Judge Shiras in *United States vs. Stecnerson*, 50 Federal Reporter, 504, as follows (59 Pac., 444) :

"If it be true in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist."

Applying the principle of this quotation to the Polglase case the Supreme Court of Montana said (p. 444) :

"Plaintiff's rights were forfeited, and the Maud S. claim was subject to relocation, at the time the Ramsdell claim was located. To hold otherwise would be to lend assistance to the fraud attempted by plaintiffs, and which would have been successful but for its exposure made by defendants and their predecessors. It would permit them to profit by their own misconduct in violation of the principle

expressed in the wholesome maxim, '*Nemo allegans suam turpitudinem est audiendus.*'"

The court expressly held that the facts of the case before it were exceptional and that its decision was confined to the particular case before it, saying (p. 445):

"Such a receipt is not open to collateral attack in the courts in controversies arising between rival claimants to lands covered by them. This case is an exceptional one, and is decided upon its own particular facts, under the principles applicable to them."

The case of *Murray vs. Polglase* is hence not in conflict with the contention of defendant company that its entry in 1905 invalidated plaintiff's locations in May, 1906, before the cancellation of such entry, since there is a total absence of all showing that the entry here was procured by defendant company's fraud. On the contrary, the entry was made as a result of a *bona fide* mistake by defendant company and the local officers. Had such mistake been discovered by the latter before the purchase, it could easily have been remedied and the proceedings would thus have been regular in every respect. In the *Polglase* case the court conceded the general rule that an entry made in good faith operates as a withdrawal of the lands embraced therein from the public domain. It should be noted, too, that the court drew no distinction between an agricultural and a mineral entry in this respect, as did the court below, but, on the contrary, cited cases involving agricultural entries and holding that such entries segregate the lands from the public domain as sustaining the same rule with respect to mineral entries.

The Supreme Court of Montana decided the *Polglase* case on December 18, 1899. The judgment of the court directed the reversal of the trial court's judgment and the remanding of the case. Subsequently the suit was dismissed by *Murray* on October 15, 1901.

Polglase's application for patent, which was the occasion

of the adverse claim suit just discussed, was made on September 17, 1892. After the dismissal by the Supreme Court of Montana of the intervention of Adams *et al.* in that suit on December 18, 1899, Adams filed protest on December 30, 1899, against the granting of patent to Polglase, relying upon his location of January 31, 1894, and claiming that the applicant's location was invalid because made while the ground was covered by a subsisting entry in favor of Murray. The local officers sustained Adams' position. The Commissioner reversed the local officers, and on appeal the Secretary of the Interior affirmed the Commissioner's ruling. *Adams vs. Polglase*, 32 L. D., 477. The Secretary based his decision on the ground that the location relied upon by Adams was made after the expiration of the period of publication of the Polglase application for patent and that there was no showing that Polglase had been negligent in carrying his patent proceedings to completion. Wholly by way of *dictum* the Secretary said (p. 478):

"It may be conceded, however, that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled, the lands from such date became subject to location, and the prior location by the Ramsdell lode claimants became from such time effective, if rights thereunder were then being, and were thereafter asserted according to the mining law. On this question there does not seem to be any doubt. See *Noonan vs. The Caledonia Gold Mining Company* (121 U. S., 393)."

On motion for review the Secretary, in explaining the citation of the case of *Noonan vs. Caledonia Mining Co.*, in view of the later case of *Kendall vs. San Juan Mining Co.*, 144 U. S., 658, limiting the *Noonan* case, said (33 L. D., 30, 31):

"The *Noonan* case was cited in the decision sought to be reviewed only for the reason that the holding therein is in line with the long-established ruling of the Department, in cases similar to the present one,

to the effect that mining locations or entries under the public-land laws, made upon lands not at the time regularly subject thereto, may nevertheless, if maintained in good faith, and the land subsequently becomes subject to such location or entry, be permitted to remain intact, as having attached on such date, if at that time there be no adverse claim."

The motion for review was denied on the ground that Adams had no claim to the land when the Maude S. entry made by Murray was canceled. The Secretary's decision was hence practically a ruling that the only reason why Adams' contention was not sustained was that he (Adams) was not in a position to insist upon such contention.

In *Noonan vs. Caledonia Mining Co.*, 121 U. S., 393, an adverse claim suit, plaintiff claimed under a location made in June, 1876, and defendant under a location in the preceding February. The land at the time of both locations was embraced within an Indian reservation and was not restored to the public domain until February 28, 1877. On March 15, 1877, plaintiff made an additional and supplementary claim and location of the Caledonia lode, and on the same day had a certificate or notice of the original claim and location, as well as of the additional and supplementary claim and location, recorded in the mining records of the district. By reason of this fact the court held that plaintiff's right was superior to that of defendant, notwithstanding the prior location of the latter in point of time. This case therefore distinctly holds that if a location is made on lands not within the public domain that location does not become valid *eo instanti* that such lands are restored to the public domain unless the locator in some manner renews his location. The case of *Kendall vs. San Juan Mining Company*, 144 U. S., 658, further sustains this holding. There plaintiffs claimed under a location of land then embraced within an Indian reservation. Defendant claimed under a location made shortly after the extinguishment of the Indian title. Judgment was given for the defendant, the court holding (pp.

663-664) that if plaintiffs had relocated immediately after the withdrawal of the reservation they would have brought themselves within the rule of the *Noonan* case.

Applying the last two cases to the case in hand, we submit that since at the time of plaintiff's location in May, 1906, the land embraced therein was covered by defendant's prior entry, and was hence segregated from the public domain, such locations were invalid and did not become valid upon the cancellation of defendant company's entry and the restoration of the lands to the public domain thereby. An entirely new location after such cancellation was necessary to give plaintiff any right to the land now claimed.

Summarizing the argument under this head, we submit:

1. That defendant's entry was not void, but only voidable;
2. That such entry was not declared void *ab initio* by the Secretary of the Interior;
3. That if the Secretary meant so to hold, that holding was not necessary to his decision and was beyond his power to make;
4. That until canceled such entry segregated the land embraced therein from the public domain;
5. That plaintiff's locations made while defendant's entry was outstanding and uncanceled were invalid;
6. That such locations did not become valid upon the cancellation of defendant's entry;
7. That in the absence of all proof of a relocation by plaintiff subsequent to the cancellation of defendant's entry plaintiff has no right in or to the land claimed by virtue of his locations in May, 1906.

B.

**The Cancellation of Defendant's Entry of October 23, 1905,
was Erroneous.**

It is now submitted that the order of the Secretary of the Interior cancelling defendant's entry was erroneous, and that defendant is entitled to be put back in the position it occupied at the time of such entry, and submit supplemental proof of the posting of notice on the lands embraced thereby. If this contention is sustained by the court, then defendant company is entitled to a reversal as to all of plaintiff's locations, both those before and those after defendant's entry. The former would be ineffective because no adverse predicated thereon was made to defendant's application; the latter would be ineffective because too late in point of time. It will be remembered that the fact of such posting clearly appears and that publication was made by the local officers in the usual manner. Hence persons wishing to assert adverse claims to the ground covered by defendant's application received all the notice they would have received had defendant's affidavit been executed within the land district where the land was situated for patent to which application was made. Thus defendant's entry was cancelled for a mere technical defect, and the refusal of the Secretary to allow the filing of a supplemental affidavit properly acknowledged, and thereby to validate the entire patent proceedings, was, if possible, based upon an even more technical ground.

The court below, in considering this aspect of the case, said (R., 165):

"There can be no question but that the decision of the Land Department is binding in this case."

Only the Facts Found by the Land Department on Defendant's First Application for Patent are Binding in This Action.

For this proposition of law the court cited *Smelting Company vs. Kemp*, 104 U. S., 636, and *Knight vs. United States Land Association*, 142 U. S., 161. These cases lay down the rule, which we do not dispute, that a patent to public lands cannot be collaterally impeached in an action at law. But no patent has issued to the ground in controversy. The defendant company was the first to locate that ground and make application for patent thereto. No adverse was filed and it was allowed to make a purchase. Any claim that plaintiff may have then had was lost by his failure to adverse. The Land Department erroneously canceled defendant's purchase, and unless defendant can now be heard respecting its rights under that purchase it is forever foreclosed from securing a judicial review thereof; for under Rev. Stat., sec. 2326, the plaintiff, if successful in this litigation, may file a certified copy of the judgment roll with the local officers and thereon secure patent to so much of the ground as the court may decree him entitled to. If the Land Department was wrong in cancelling defendant company's entry, then defendant was wrongfully required to proceed *de novo*, and its right to possession should be sustained in this proceeding to the end that the Department may correct its error and reinstate the entry. Pending this litigation the Land Department is deprived of jurisdiction over defendant company's patent proceedings. Surely the mere fact that the company, bowing to the Secretary's decision cancelling its entry and doing only what was practically forced upon it thereby, relocated its claims in September, 1908, solely to conform them to the public surveys which had been made after the original location, and thereafter began the patent proceeding out of which this adverse action grew, cannot be a sufficient basis for the destruction of a right already acquired and im-

properly denied. This is especially so in view of the uniform ruling of this court that the decisions of the Land Department are binding on the courts only as to the facts found and not as to their legal conclusions. In *Wisconsin Central R. R. Co. vs. Forsythe*, 159 U. S., 46, 61, it was said:

"But, further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department. *Johnson vs. Towsley*, 13 Wall. 72; *Shepley vs. Cowan*, 91 U. S. 330; *Quinby vs. Conlan*, 104 U. S. 420; *Doolan vs. Carr*, 125 U. S. 618, 624; *Lake Superior Ship Canal &c. Co. vs. Cunningham*, 155 U. S. 354."

Under these cases, and many more of like import, the only matters in the Secretary's decision cancelling defendant's entry that are binding upon this court are the findings of fact that proper notice was posted on the premises and that the affidavit was verified outside of the land district. But the legal effect which the Secretary ascribed to those facts does not conclude this court.

Reviewing the Legality of the Cancellation of Defendant's Entry in October, 1905, is Not a Collateral Attack upon the Land Department's Action.

Neither can it be said that to allow a review of the Secretary's action cancelling defendant's entry would permit a collateral attack upon the action of the Land Department. In *Rebecca Gold Mining Company vs. Bryant*, 31 Colo., 119; 71 Pac., 1110, an action in support of an adverse claim, there were three separate locations made of a triangular strip of ground in controversy—the C. O. D. in 1891, the Rebecca in 1892, and the Helen B. in 1898. The contest was between the owners of the latter two locations. When the C. O. D.

locator applied for patent, after the Rebecca location was made, the triangular strip was expressly excluded from the application as it was from the patent issued to the C. O. D. locator in 1893. The evidence showed that the strip was included in the C. O. D. location by mistake and that no claim was intended to be made thereto by the owners of that location. In 1895 the Rebecca locator applied for patent, and in one of the papers constituting the application the triangular strip was excluded by mistake. This error was rectified by proper amendment, and the strip was covered by the entry allowed by the local officers. Before patent the Commissioner of the General Land Office, of his own motion and without notice to the Rebecca owners, cancelled the entry as to this strip, because of its erroneous exclusion from one of the patent papers, as stated, and the strip was excluded from the Rebecca patent issued in 1895. In 1898 the plaintiff discovered the fact of the exclusion of this strip from both the C. O. D. and the Rebecca patents, and later in the same year located the strip as the Helen B., though it was covered by both of the prior locations. The C. O. D. and Rebecca patents were properly recorded, and the two mines covered thereby were conveyed to defendant company. When plaintiff made application for patent to the Helen B. the Commissioner refused to consider his proceeding as an application for patent. The Department ruled that the change made in the certificate of purchase of the Rebecca locator was unauthorized and that the controverted strip should have been included in the Rebecca patent. However, since plaintiff, as the owner of the Helen B., claimed rights in the strip, the owners of the Rebecca were required to start patent proceedings anew. When defendant, as the owner of the Rebecca, again applied for patent plaintiff filed an adverse, and this action followed. The Supreme Court of Colorado expressly passed upon the authority of the Commissioner to order a partial cancellation of the Rebecca entry, saying (p. 1112):

"That receipt vested in those to whom it was issued the right to a patent, which has not yet been, and cannot now, on the facts before us, be, divested. The subsequent action of the Land Department in assuming to cancel this entry to the extent of the ground in conflict was wholly unauthorized and void, as the Commissioner of the General Land Office himself subsequently ruled * * * We are of opinion that the receiver's receipt for the Rebecca, which the appellant holds, has not been lawfully canceled, and that in this proceeding its validity has not been impeached."

The Rebecca Gold Mining Company case is exactly parallel to the case in hand. There, as here, an entry was erroneously cancelled by the Department, making necessary patent proceedings *de novo*. In that case the court reviewed the authority of the Commissioner to direct the cancellation of the entry and found against such authority. So here the court should review the legality of the cancellation of defendant company's entry, and, as we shall presently show, should find against such legality.

Southern Cross Gold Mining Co. vs. Sexton, 147 Cal., 758; 82 Pac., 423, is in point. Defendant having made a valid location applied for patent in January, 1885. Notice of application was published by the local officers, but the published notice erroneously described the premises applied for. No adverse claims were filed, the purchase price was paid, and entry allowed. In July, 1895, the Commissioner directed the republication of notice so as to cure the defect in the previous notice. Extensions of time were granted defendant and publication was finally made from December 14, 1900, to February 15, 1901. In November, 1901, the plaintiff company, which had made its location in July, 1900, moved the Department to cancel defendant's entry, and on April 22, 1902, the Secretary granted the motion, directing the cancellation to be made as of date July 23, 1895, when the Commissioner called for republication of notice. Defendants had performed no annual labor since the date of their entry, so that

if the Secretary's order of retroactive cancellation was valid, the rights of plaintiff company under its location in July, 1900, were superior to those of defendant, and the trial court so held. The Supreme Court of California, however, reviewing the Secretary's order cancelling defendant's entry, held that it was beyond that officer's power to enforce a retroactive cancellation, and said (p. 425):

"The cancellation must therefore, in point of law and equity, be deemed to have been made and to be effective from the date of the Secretary's letter, and the judgment appealed from is therefore reversed."

Here again the plaintiff's location was made between the date of defendant's entry and the cancellation thereof. The court reviewed the action of the Land Department directing such cancellation, and, overruling the Department, adjusted the rights of the parties accordingly. Such a review is what we ask in the instant case.

The question now narrows itself down to this: Was the cancellation of defendant company's entry erroneous? On this point the ruling of the Commissioner in the case just discussed is illuminating. There the patent proceedings were defective because of the erroneous description of the premises in the published notice, a matter going to the very essence of such proceedings, for obviously without proper notice third parties are unable to assert adverse claims. Yet the Commissioner ordered republication of notice, with proper description of the premises, and the action of the Secretary (31 L. D., 415) attempting to make a retroactive cancellation was reversed by the court. Here the technical defect in the verification of the affidavit of posting was held to make the patent proceedings so defective as not to be cured by a properly verified affidavit later tendered for filing.

**The Cancellation of Defendant's Entry in October, 1905,
was Erroneous as a Matter of Law.**

The opinion of the Secretary ordering the cancellation of defendant's entry because of the defective affidavit relies upon two cases, *Frazier Borate Mining Co. vs. Calm* (unreported department decision of June 15, 1905) and *Mattes vs. Treasury, etc., Co.* (Dec. 26, 1905), 34 L. D., 314. The latter case is the only one of the two cases cited with knowledge of which defendant company can be charged, and that case was decided after defendant's entry in October, 1905. That case merely held that affidavits verified outside of the land district were not properly executed under section 2335, Revised Statutes, and not that such defective verification could not be cured by filing a supplemental affidavit, which latter is all that defendant company contends for. At the time defendant's entry was allowed the practice of the Department was to allow the filing of a supplemental affidavit properly verified. This appears from the case of *Loneragan vs. Shockley* (September 14, 1904), 33 L. D., 238, in which the application for patent and the affidavits made thereunder verified outside of the land district were held sufficient. In the course of the opinion it is stated (p. 240) that the Commissioner had ruled "that the affidavits in support of the application, not being sworn to within the land district where the claims are situated, are defective, and are to be returned to the local officers in order that they 'may be properly verified *nunc pro tunc*.'" Such was the practice of the Department at the time of defendant company's entry, and yet defendant was not allowed so to file a properly verified affidavit. That the early departmental practice was in accordance with the ruling in *Loneragan vs. Shockley, supra*, is shown by the case of *Corning Tunnel, etc., Co. vs. Pell* (Feb. 17, 1877), Sickles' Min. Dec., 307 where it was held that an adverse claim sworn to before an officer out of the land district, but whose jurisdiction extended into the land

district and who acted within his jurisdiction, was a sufficient compliance with Rev. Stat., sec. 2335, herein involved. The Secretary said (p. 308):

"Section two thousand three hundred and thirty-five of the Revised Statutes of the United States provides that 'all affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths *within* the land district where the claims may be situated.' I am of the opinion that under this statute an officer authorized to administer oaths *within* the land district may administer oaths *without* the district, but within the jurisdiction."

It was not until the case of *Mattes vs. Treasury, etc., Co., supra*, after defendant's entry in this case, that the departmental practice was changed so as not to permit the filing of a supplemental affidavit properly verified according to law. The *Mattes* case expressly overruled *Lonergan vs. Shockley*, which laid down the practice prevailing at the time of defendant company's purchase. The Department has now gone back to its former practice, so that if defendant's application were now before the Department opportunity would be afforded defendant to make such supplemental showing. This is all that defendant claims to be entitled to. The present practice of the Department which holds that a defective affidavit of posting does not go to the jurisdiction of the Land Department over patent proceedings so as to render them absolutely null and void, but merely makes such proceedings voidable and allows the curing of the defect by the filing of supplemental affidavits *nunc pro tunc*, dates back to the *Stock Oil Company* case (July 29, 1911), 40 L. D., 198, and found in this record (R., 127-134), overruling *El Paso Brick Co.*, 37 L. D., 155. The practice is the same with regard to affidavits accompanying homestead applications, *Cleaves vs. Smith*, 22 L. D., 486, *Fidelo C. Sharp*, 35 L. D., 179; pre-emption claims, *Michael Leahy*, 22 L. D., 114;

desert-land applications, *Daniel C. Boomer*, 18 L. D., 364; timber culture entries, *Brox vs. Tobias*, 17 L. D., 400.

Thus it appears that defendant company's application for patent happened to come before the Land Department at a time when the prevailing view chanced to be that a defective affidavit of posting was of the essence of mineral patent proceedings, contrary to the earlier as well as the recent view taken by that Department that such defect is curable by the filing of proper supplemental affidavit. The cancellation of defendant company's entry was hence, in many ways, a legal accident. That it was erroneous as a matter of law is shown by the early practice of the Department, to which the Department has again returned. Surely the defendant company should not now be prejudiced by reason of the error of law committed by the Department. On the contrary, its rights acquired by its voidable purchase in October, 1905, should be recognized and sustained in this action, growing out of the erroneous cancellation of that purchase.

**As an Original Matter the Cancellation of Defendant's Entry
was an Error of Law.**

The Commissioner and the Secretary confused the *fact* of posting with the *proof* of such posting. The former is *jurisdictional*; the latter is not. *Without* such previous posting, the application cannot be carried forward to publication and entry; but if the affidavit of posting be *lost*, the *fact* of such posting having actually occurred and standing undisputed, there is no law or rule of practice known to any court which declares the jurisdiction defeated in the presence of the *fact*, simply through error or misplacement in the *proof* of the *fact*.

Now, in present case the fact of such posting is undisputed and is expressly found in the Secretary's decision. When the application for patent was filed, duly sworn to in the proper land district, it contained the express statement that

the plat and notice had been *in fact* theretofore posted as the law required. Now, it is the act and fact of posting which the statute requires as notice to all adverse claimants. If the affidavit of posting be presented in absolute form and the notice has not *in fact* been so posted, jurisdiction to proceed is lacking. In other words, the statute, in spirit and intent, looks to the act and *fact* of posting as furnishing the required preliminary to publication and all subsequent procedure. The notice may be incomplete—may be fatally defective. If so, the affidavit of posting, executed in complete *form*, does not save it. Jurisdiction attaches when the posting of notice actually occurs. Loss of the proof of posting would not defeat the jurisdiction. How, then, can mere irregularity in proof be visited with any graver consequence?

That such is the essence and meaning of the law is clearly and accurately stated by *Lindley on Mines*, vol. 2, sec. 677, thus:

"Posting of the notice and copy of the plat on the claim.—As a condition precedent to the filing of an application for patent to a lode claim, the claimant is required to post a copy of the plat of the survey in a conspicuous place upon the claim, together with a notice of his intention to apply for a patent therefor.

* * * * *

"The posting of this notice on the claim and in the register's office and its subsequent publication are jurisdictional matters, any serious irregularity in which may jeopardize, if not wholly vitiate, the subsequent proceedings. If any one of the three notices is insufficient, they are all rendered valueless.

* * * * *

"The notice should be posted in the presence of two witnesses, who should sign the same for purposes of identification."

Again, section 713, the same learned authority says:

"The *publication* and *posting* of notice of the application for patent is a *process* which brings all adverse claimants into court—a summons to all persons whose interests may be affected by the issuance of a patent to the tract applied for, to appear and file their adverse claims."

Citing Mr. Justice Brewer, in *Wright vs. Du Bois*, 21 Fed. Rep., 693, 695, viz:

"True, no adverse claimant or supposed claimant may be named in the notice; no process may be served personally upon him; but that does not avoid the notice or weaken its sufficiency to bring such party into court."

And that the application may properly recite (and hence prove) such posting, Mr. Lindley says, vol. 2, sec. 680:

"*The application for patent—Its contents.*—While the Department may be satisfied with a less formal document, there is no reason why an application for a patent should not contain a recital in ordinary and concise language of the ultimate facts chronologically arranged, which, if tested by the ordinary rules of pleading, would affirmatively show the right of the claimant to the tract. We should outline the contents as follows, the instrument to be addressed to the register and receiver of the land office:

* * * * *

"(9.) The fact and date of posting a notice of the application and copy of the plat on the premises, referring to the affidavit of such posting accompanying the application.

"A petition or application thus framed presents a foundation for such corroborative evidence as is required by the rules."

Now, the applicant filed *de novo* affidavits of the same parties and sworn to within the local land office showing affirmatively the same (and undisputed) fact that the notice *was* so posted on June 10, 1904, and the affidavit of continuous posting as well, and the case hence falls fully within the rule declared by Mr. Secretary Chandler in *City Rock vs. King of the West* (Copp's U. S. Mining Laws, pp. 217, 218), where, in ruling upon the precise objection here raised, the Secretary justly said:

"It must be remembered that all the proof made
"in an application for a patent of mining claim is
" *ex parte*, and that proof that the applicants have
"complied with the law is of more importance than
"the time or order in which it is made."

Necessarily, the foundation of all proceedings *in rem* is notice. But it is the *fact* of notice which controls, and the jurisdiction is not defeated nor its effect impaired because of some technical defect of form in the record proof of such notice.

A libel duly published, with proper monition, will bind the world in an admiralty cause or proceeding, even though the affidavit of publication is faulty in form or execution. The law looks to the *substance* of things, and if the notice has been in fact given and is in full and proper form, the proceeding cannot be defeated because the proof of the fact of publication is open to some technical objection. So here, proper process was in fact issued; the publication in the three modes prescribed by the law was fully and properly had. To say that it fails only because the affidavit of posting is lacking in form cannot destroy the notice, which was in fact posted and was so given. The *notice* so posted was one of the constituent elements of *process*, not the affidavit that the notice had been so given—*i. e.*, posted. And herein lies the plain difference in principle and consequent legal effect between the *process*, which under the mining law constitutes the proceeding *in rem*, and the response by an individual

adverse claimant to such process. The notice of an application for patent is notice of a proceeding strictly *in rem*. It seeks and does fix the status of the thing, to wit, the mining claim. But when the individual adverse claimant *responds* to that notice the proceeding on his part is wholly individual. He, for the first time, files his claim and must show under oath "the nature, boundaries, and extent" thereof. The adverse claim is *his* showing, and precisely as the applicant for patent has sworn to *his* application, the adverse claimant must swear to *his* adverse claim thereto.

In holding that under section 2335 the adverse claim must be sworn to within the land district, the Department simply applies to the adverse claimant the same rule which requires the applicant to swear to his application within the land district. Now, in present case, the applicant had, under proper oath and as part of its application, pleaded therein that the notice of its application had as a *fact* been properly posted on the ground applied for. That being so as a *fact* (and standing here unchallenged), the proof *aliunde* of such posting is not fatal against all correction or amendment simply because the affidavit is technically, for any cause, insufficient. The law does not impose that punishment, and there is so plain distinction in principle that what would be fatal to the application in the one instance or to the adverse claim in the other—failure to attest within the land district—would not defeat jurisdiction nor hence invalidate the proceeding.

Suppose the affidavit of posting, by mere blunder, lacked the official seal of the officer or the proper caption, the doctrine which would reject the instrument for any cause would defeat its acceptance for any purpose, because it must be *complete* or it cannot be accepted when it cannot afterwards be *amended*.

We draw, then, the sharp distinction between those acts under the mining law which are primary, and hence fundamental, and those which are merely *evidential*, and hence secondary. In the application for patent the applicant is

setting forth the grounds on which *he* claims the right of purchase. In the adverse claim his adversary is stating the grounds on which *he* claims such preference. That is original pleading, but evidential facts supporting either claim are secondary only; and, as held by Mr. Secretary Chandler *supra*, "proof that the applicants have complied with the law is of more importance than the *time* or *order* in which it is made."

And in such view it may be pertinently asked, *Why* cannot an affidavit showing the fact of posting be amended—the actual fact of posting being admitted—precisely as all other proof required under the mining law? The affidavit of continuous posting, of publication, of citizenship, &c., may be and are so amended or resupplied as matter of daily practice. When the issue is not the *fact* or sufficiency of the posting, but wholly and only the formal evidence of the *fact* of posting, we submit the rule which applies to the application for patent or to the adverse claim in respect of *time* and *place* of execution has no just application in principle, nor is it required in sound administration. And even in such contrary view, where, as here, the jurisdictional *fact* appears by the application for patent and stands (as here) unchallenged, the application of such a rule is harsh in the extreme, for it ignores the admitted existence of the fact as averred by and in the application for patent, and defeats the entire proceeding when the existence of the *very fact* to which the evidence *aliunde* is directed is plainly admitted. The mining law did not intend to thus punish the honest miner nor substitute the subtleties of form for the actual and demonstrated existence of the *fact*.

And this contention accords with the general principle strongly stated by Mr. Justice Miller, in speaking for the court, in *Cooper vs. Reynolds*, 10 Wallace, 308, 319, as follows:

"Now, in this class of cases, on what does the
"jurisdiction of the court depend? It seems to us
"that the seizure of the property, or that which, in

"this case, and the same in effect, the levy of the writ
 "of attachment is it, is the one essential requisite
 "to jurisdiction, as it unquestionably is in proceedings
 "purely *in rem*. Without this the court can
 "proceed no further; with it the court can proceed
 "to subject that property to the demand of plaintiff.
 "If the writ of attachment is the lawful writ of the
 "court, issued in proper form under the seal of the
 "court, and if it is by the proper officer levied upon
 "property liable to the attachment, when such a writ
 "is returned into the court, the power of the court
 "over the *res* is established. The affidavit is the pre-
 "liminary to issuing the writ. It may be a defective
 "affidavit, or possibly the officer whose duty it is to
 "issue the writ may have failed in some manner to
 "observe all the requisite formalities; but the writ
 "being issued and levied, the affidavit has served its
 "purpose, and, though a revisory court might see in
 "some such departure from the strict direction of
 "the statute sufficient error to reverse the judgment,
 "we are unable to see how that can deprive the court
 "of the jurisdiction acquired by the writ levied upon
 "defendant's property.

"So also of the publication of notice. It is the
 "duty of the court to order such publication, and to
 "see that it has been properly made, and un-
 "doubtedly *if there has been no such publication*, a
 "court of errors might reverse the judgment."

It will thus be plainly seen how clearly and strongly the
 court of last resort distinguishes between the *absence* of
 notice and the proof or evidence of such notice; for, in the
 case cited, the absence of publication would require reversal,
 whereas (as here) the jurisdiction which attaches upon the
 giving of notice in fact is not defeated because the proof
aliunde thereof may be lacking in respect of technical form.

By prior location defendant concededly was entitled to
 possession. This possession was maintained and preserved
 as against the world by the patent proceedings resulting in
 the purchase of 1905; for, admitting a valid relocation of the
 premises, rights thereunder as against this claimant were

terminated by failure to adverse the application of 1905, and surely the benefits of the right thus conferred by the statutes are not lost by the erroneous ruling of the Land Department and the forced proceedings *de novo*. These proceedings are but supplemental to those resulting in purchase in 1905, and the possession originally gained and thereafter maintained should be preserved as against the present adverse.

DID PLAINTIFF PROVE THAT THE LAND IN DISPUTE WAS PART OF THE PUBLIC DOMAIN AT THE TIME OF HIS LOCATIONS, ORIGINAL AND AMENDATORY?

This question has been discussed from the standpoint of defendant company's entry of October, 1905, and the consequent invalidity of plaintiff's attempted locations in May 1906. Independently of this, it is submitted that plaintiff did not sustain the burden resting upon him to prove that the disputed territory was part of the public domain at the time of his attempted appropriation thereof in April, 1905, and May, 1906. By the act of March 3, 1881 (21 Stats. L. 505), it is provided:

"That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict."

Under this statute it was the duty of the plaintiff to establish by affirmative evidence that the land embraced in his locations was public land. Such showing must be as against the world, and not as against the defendant company only. No evidence was adduced at the trial, except that relating to defendant company's locations and claims thereunder, which shows the status of the controverted land at the time of plaintiff's relocations. The court below found (Finding VI, R. 141-142) that plaintiff's relocations in April, 1905, were made "upon the public domain of the United States open to

mineral entry." But this was properly a conclusion of law from the evidence in the case and not a finding of fact. No similar finding was made with respect to plaintiff's relocations, original and amendatory, in May, 1906. Defendant called the failure of proof by plaintiff to the trial court's attention by requested findings four and nine (R., 68, 69). But the trial court refused to find that the proof assumed to show that the controverted ground was part of the public domain at the time of plaintiff's relocations was inadequate (Finding VI, R., 85, 86).

In *Gwillim vs. Donnellan*, 115 U. S., 45, 50, an adverse claim suit brought to establish a possessory title, this court said:

"To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute, superior in right to that of the defendants. His location must be one which entitles him to possession as against the United States, as well as against another claimant. If it is not valid as against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated. * * *

"In this action the plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary. The question to be settled by judicial determination, so far as he is concerned, is as to his own right of possession. *He must establish a possessory title in himself, good as against everybody.*" (Italics ours.)

And in *Brown vs. Gurney*, *supra*, p. 191, this court said:

"The object of the statute was, as we said in *Perego vs. Dodge*, *supra*, to provide, in the case of a total failure of proof of title, for an adjudication 'that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the Land Office simply because the adverse claimant had failed to make out his case, if he had also failed.' 2 Lindley on Mines, sec. 763, and cases cited."

The plaintiff has no right to insist that if it should be found there was no proof that at the time of his locations the land in dispute was vacant, unappropriated public domain as against the world, there must also be a finding against the defendant company for a similar reason. He is not entitled to raise that question because his attempted relocations necessarily conceded the validity of defendant's original locations, the rights under which he now claims were forfeited.

The following cases are in accord with the ruling in *Gwillim vs. Donnelan* and *Brown vs. Gurney*, *supra*:

Cleary vs. Skiffich (Colo.), 65 Pac., 59, 62.

Kirk vs. Meldrum (Colo.), 65 Pac., 633, 634-635.

McWilliams vs. Winslow (Colo.), 82 Pac., 538, 539.

Lozar vs. Neill (Mont.), 96 Pac., 343.

In the last-cited case, defendant moved for a non-suit at the close of plaintiff's case. The colloquy that followed was as follows (p. 345):

"DEFENDANT'S COUNSEL: The proposition is this: 'You do not show that it is public domain. It may belong to some one else.' PLAINTIFF'S COUNSEL: 'Some one else should show it.' THE COURT: 'It belongs to the Government. It may belong to some one else. Defendants may not own it at all, and you have got to prove that at the time you take and enter upon the property that it is public domain of the United States, free and clear from any claim at all. That you haven't proved, although you have alleged that it was public domain. I shall grant the motion for a non-suit.'"

The Supreme Court of Montana sustained the trial court, saying (p. 345):

"We are satisfied that the ruling of the district court was correct."

Conceding for purposes of argument that the evidence in the case shows that plaintiff's locations are superior to those of defendant company, the evidence does not show that the land to which plaintiff asserts a right was not embraced in a valid location owned by some third party. It was obviously incumbent upon the plaintiff to establish this fact by an affirmative showing since the burden was upon him to prove that the land was vacant, unappropriated public domain at the time of his attempted locations. It is a matter of common knowledge in mining regions that the same land is frequently covered by several locations, and in the light of this well-known fact the omission in the plaintiff's proof must be held to be fatal.

We submit the judgment below should be reversed.

Respectfully submitted,

ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
FRANCIS W. CLEMENTS,
Attorneys for Appellant.

W. A. HAWKINS,
JOHN FRANKLIN,
Of Counsel.

[23354]

Office Supreme Court U. S.

FILED

JAN 21 1914

JAMES D. MAHER

CLERK

**IN THE SUPREME COURT OF THE
UNITED STATES.**

OCTOBER TERM, 1913.

No. 185.

EL PASO BRICK COMPANY,

Appellant.

vs.

JOHN H. McKNIGHT,

Appellee.

Appeal from the Supreme Court of the Territory of
New Mexico.

BRIEF FOR APPELLEE.

EUGENE S. IVES,

Attorney for Appellee.

INDEX TO TOPICS.

	Page
Statement.....	1- 9
Statement of propositions advanced.....	9-10
Argument thereunder.....	10-94
Proposition I. The finding of the Court that no assess- ment work was done upon the Hortense and Alumi- num claims for the years 1904 and 1905 is sustained by the evidence.....	12-26
(a) The affidavit of labor was insufficient.....	12-15
(b) The New Mexico statute does not conflict with the Federal statute.....	15-18
(c) The affidavit is ineffective for any purpose other than to establish the fact that no proof of assessment work for the years 1904 or 1905 was recorded in pursuance of the Territorial statute.....	18-26
Proposition II. It is admitted by the pleadings that appellant did not resume work prior to appellee's locations or relocations.....	26-29
Proposition III. Appellant had the burden of proving re- sumption of work before relocation by appellee.....	29-42
(1) Because failure to do assessment work hav- ing been proved, resumption, being a changed condition, will not be presumed.....	29-33
(2) Because resumption of work being ineffec- tive unless done in good faith, presumption would have to include latter as well as former element.....	33-34
(3) Counsel's statement as to law of resumption is incorrect.....	34-37
(4) Because the proviso at the end of Section 2324 is an exception to the general and preceding terms of the statute.....	37-41
(5) Because New Mexico statute shifts the bur- den as to resumption.....	41-42

Proposition IV. The final receipt issued to appellant in the light of the subsequent adjudication rejecting appellant's application for patent and canceling such final receipt was ineffective to segregate the lands from the public domain pending the adjudication as to its validity, and this without respect to whether such final receipt was void ab initio or only voidable.....	42-62
Brown vs. Guernsey, 201 U. S. 184, is full support of appellee's contention.....	49-52
Murray vs. Polglase, 17 Mont. 455; Adams vs. Polglase, 23 Mont. 401, and Adams vs. Polglase, 32 Land Dec. 477, are conclusive against appellant's contention.....	52-58
The rule that invalid agricultural entries segregate the land until cancellation is not inconsistent with the principle that the fact of segregation depends fundamentally upon the fact of an interest in the property existing in a third party.....	58-60
Patent proceedings only dispense with annual labor in the event that they result in patent	60-62
Proposition V. The entry of appellant was void ab initio.....	62-83
Cases cited by appellant analyzed and shown to be inapplicable.....	72-76
The decision of the Land Department cannot be reviewed in this action.....	76-78
The action of the Land Department cannot be reviewed in this action.....	78-83
Proposition VI. The territory embraced within appellee's claims was a part of the public domain.....	83-92
Proposition VII. The original location of the Hortense and Aluminum were void for the reason that the locators were dummies used by appellant to the end that it might evade the U. S. Law and locate more than 20 acres of land in one claim.....	92-94

CASE INDEX.

	Page.
Adams vs. Polglase, 32 Land Dec. 477	56
Adams vs. Polglase, 23 Mont. 401, 59 p. 439	42, 52, 54
Alaska, Congressional Act of Labor Proof	16
Althouse vs. Town of Jamestown, 91 Wis. 46, 64 N. W. 423	86
Alta Wis. & S. Co. vs. Benson, Min. & S. Co.	44, 73
Arapahoe & Co., Little, etc. & Co. vs.	31
Ard vs. Brandon, 211 U. S. 11	43
Arkansas, Lytle vs.	75
Aurora Hill, etc. Co. vs. 85 Mining Co., 34 Fed. 515	73, 75, 79
Austin vs. U. S., 156 U. S. 417	38
Axiom Min. Co. vs. White, 10 S. D. 198	33
Baisley, Bishop vs.	33
Baldwin, McCormick vs.	33
Barclay, Justice Min. Co. vs.	35
Beals vs. Cone, 27 Col. 473, 62 pp. 948, 958	33
Benson Min. & S. Co. vs. Alta Min. & S. Co., 145 U. S. 428	44, 73
Birth, Greenleaf's Lessee vs.	23
Bishop vs. Baisley, 28 Ore. 119, 41 p. 936	33
Brandon, Ard, vs.	43
Brown, vs. Guernsey, 201 U. S. 184	49, 91
Bruschi, Goldberg vs.	89
Bryant, Rebecca Gold M. Co. vs.	79
Burke, Providence Gold. Min. Co. vs.	33
Caledonia Min. Co., Noonan vs.	56, 72
Cal. Oil Co., Gird vs.	93
Callaghan vs. James, 141 Cal. 291, 74 p. 853	33
Chesapeake Bank vs. Swain, 29 Md. 483	21
Colcord, Hodges vs.	59
Champagne Min. Co., Neilson vs.	73
Cone, Beals vs.	33
Cook vs. Klomos, 164 Fed. 529	93
Costigan on Mines, p. 286	61

Cyc. Vol. 17, p. 52.....	24
Vol. 27, p. 595.....	33
Davenport vs. Ladd, 38 Minn. 545, 38 N. W. 622.....	86
85 Min. Co., Aurora Hill, etc. Co. vs.....	73, 75, 79
Encyc. Pl. & Pr. Vol. 1., pp. 334, 335.....	19
Vol 1, p. 802.....	85
Vol. 1, p. 804.....	86
Flanagan, McCracken vs.....	69
Garfield, etc. Co., Hammer vs.....	33
Georgia Banking Co. vs. Smith, 128 U. S. 174.....	38
Germania Iron Co. vs. James, 89 Fed. 811, 107 Fed. 597.....	46, 48
Gillett, Quigley vs.....	33
Gird vs. Cal. Oil Co., 60 Fed. 531.....	93
Givens, Henderson vs.....	20
Goldberg vs. Bruschi, 146 Cal. 291, 81 p. 24.....	89
Greenleaf's Lessees vs. Birth, 5 Pet. 131.....	23
Guerney, Brown vs.....	49, 91
Hall vs. Kearny, 18 Colo. 505, 33 p. 373.....	32
Hammer vs. Garfield Min. Co., 130 U. S. 291.....	33
Hastings, etc. R. Co. vs. Whitney, 152 U. S. 363.....	72
Hays, Klopenstine vs.....	36
Henderson vs. Givens, 16 Ala. 261.....	20
Hirschler vs. McKendricks, 16 Mont. 211, 40 p. 290.....	33
Hodges vs. Colcord, 193 U. S. 192.....	59
Homestead Min. Co., U. S. vs.....	23
Honaker vs. Martin, 11 Mont. 91, 27 p. 397.....	33
James, Germania Iron Co. vs.....	46, 48
James, Callaghan vs.....	33
Johnson vs. Young, 18 Colo., 625, 34 p. 173.....	32
Jordan vs. Duke, 6 Az. 55, 53, P. 197.....	33
Justice Min. Co. vs. Barclay, 82 Fed. 554.....	35
Kearney, Hall vs.....	32
Kemp, Smelting Co. vs.....	76
Kendall vs. San Juan, 144 U. S. 658.....	72
King vs. McAndrews, 111 Fed. 864.....	62
Kirk vs. Meldrum, 28 Colo. 413, 65 p. 634.....	88
Klomos, Cook vs.....	93

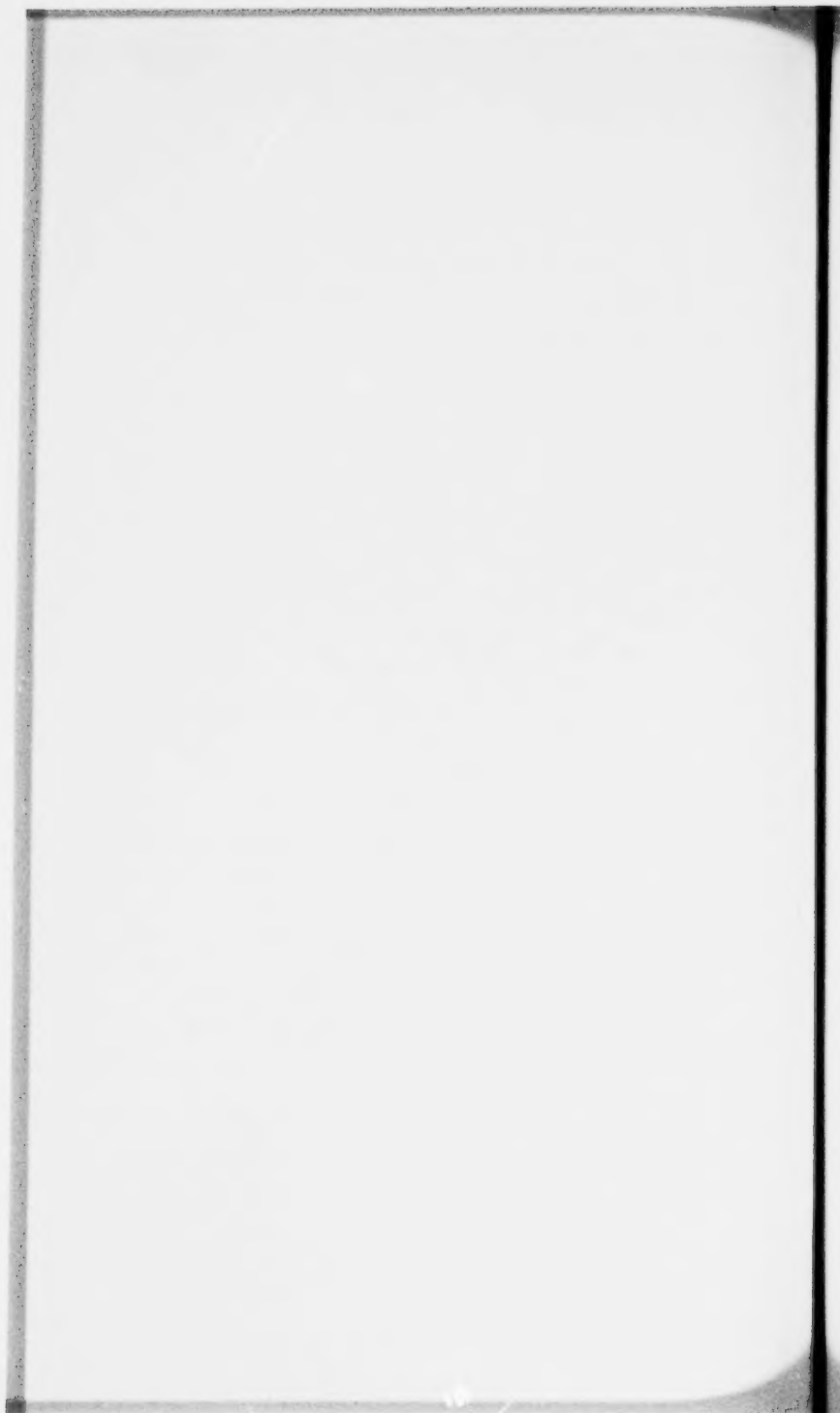
v

Klopstein vs. Hays, 20 Utah, 45, 57 p. 712	36
Knight vs. U. S. Land Assn., 152 U. S. 211	62, 77
Ladd, Davenport vs.	86
Leighton, Sherlock vs.	31, 33
Little Dorith & Co. vs. Arapahoe & Co., 30 Colo. 431, 71 p. 389	31
Lindley on Mines (2nd Ed.), Sect. 636	16, 18
" 249	18
" 645	30
" 654	33
Lozar vs. Neill, 37 Mont. 281, 96 p. 343	87
Lytle vs. Arkansas, 9 How. 314	75
Martin, Honaker vs.	33
May, St. L. & S. F. Ry. Co. vs.	20
Meldrum, Kirk vs.	88
Murphy, McCullough vs.	33
Murray vs. Polglase, 17 Mont. 455, 43 p. 505	42, 52, 55
Murray, Succession of	19, 24
McAndrews, King vs.	62
McCormick vs. Baldwin, 105 Cal. 284 37 p. 903	33
McCracken vs. Flanagan, 127 N. Y. 493, 28 N. E. 385	60
McCullough vs. Murphey, 125 Fed. 150	33
McKendricks vs. Hirschler vs.	33
McWilliams vs. Winslow, 34 Colo. 341, 82 p. 528	88
Neill, Lozar vs.	97
Neilson vs. Champagne Min. etc. Co., 111 Fed. 655	73, 75
New Dunderby Min. Co. vs. Old, 179 Fed. 602	62
New Mexico Comp. Lows., Sect. 2685, Subsec. 47	27
Subsec. 67	27
Sect. 2315	12
Noonan vs. Caledonia Min. Co., 121 U. S. 393	56, 72
Northern Pacific Co., U. S. vs.	62
Old Dunderby Co., New vs.	62
Parsons vs. Venzke, 164 Fed. 89	81
Payne vs. Wilson, 146 Fed. 488	22
Polglase, Adams vs.	42, 52, 54
Polglase, Murray vs.	42, 52, 55

Power vs. Sla, 24 Mont. 243, 61 p. 468.....	32
Providence Gold M. Co. vs. Burke, 6 Az. 323, 57 p. 641	18, 33
Quigley vs. Gillett, 101 Cal. 462, 35 p. 1040	33
Rebecca Gold M. Co. vs. Bryant, 31 Colo. 119, 71 p. 1110.....	79
Reese, Sill vs.....	23
Revised Statutes, U. S. Sect. 2324	15, 17
Sect. 2325	65
Sect. 2335	66
St. L. & S. F. R. Co. vs. May, 53 Tex. Civ. Apps. 257, 115 S. W. 900.....	20
San Juan Min. Co., Kendall vs.....	72
Santa Rita Min. Co., Upton vs.....	12
Selma, etc. R. Co. vs. U. S., 139 U. S. 560.....	38
Sexton, Southern Cross, etc. Co. vs.....	74, 80
Sherlock vs. Leighton, 9 Wyo. 297, 63 p. 580.....	31, 33
Sherman, Winants vs.....	25
Sill vs. Reese, 47 Cal. 340.....	23
Sla, Power vs.....	32
Smelting Co. vs. Kemp, 104 U. S. 636.....	76
Smith, Georgia Banking Co. vs.....	38
Southern Cross, etc. Co. vs. Sexton, 147 Cal. 758, 82 p. 423.....	74, 80
Stat. at Large, U. S. Vol. 21, p. 141.....	58
34, p. 1243.....	16
Succession of Murray, 41 La. Ann. 1109, 7 So. 126.....	19, 24
Swain, Chesapeake Bank vs.....	21
Taylor, Whitney vs.....	72
Teller vs. U. S., 113 Fed. 73.....	73
Town of Jamestown, Althouse vs.....	86
U. S. Land Ass'n., Knight vs.....	62, 77
U. S. Austin vs.....	38
U. S. Compiled Stat., Sect. 2, Ch. 89.....	58
U. S. vs. Homestead Min. Co., 117 Fed. 481.....	23
U. S. vs. Northern Pac. Co., 95 Fed. 869.....	62
U. S., Selma, etc. R. Co. vs.....	38
U. S., Teller vs.....	73

vii

U. S. vs. Winona, etc. R. Co., 67 Fed. 955	62
Upton vs. Santa Rita Min. Co., 14 N. M. 96, 89 p. 275	12
Venzke, Parsons vs.	81
White, Axiom Min. Co. vs.	33
Whitney, Hastings, etc. Rd. Co.	72
Whitney vs. Taylor, 158 U. S. 85	72
Wigmore on Evidence, Sect. 1384	19
Sect. 2112	22
Wilson, Payne vs.	22
Winants vs. Sherman, 3 Hill 74	25
Winona, etc. R. Co., U. S. vs.	62
Winslow, McWilliams vs.	88
Young, Johnson vs.	33



IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1913.

EL PASO BRICK COMPANY,

Appellant.

vs.

JOHN H. McKNIGHT,

Appellee.

No. 185.

Appeal from the Supreme Court of the Territory of
New Mexico.

BRIEF FOR APPELLEE.

STATEMENT.

Prior to December, 1900, the appellant was in the possession and control of the International claim upon which there was a large deposit of red shale, which was being used by appellant in the manufacture of brick.

On the 15th of December, 1900, E. Hewitt Rogers and others, located the Aluminum claim upon ground contiguous to the International claim, and upon the 31st of

March, 1902, the same parties located the Hortense claim, which was similarly situated.

The locators of the Aluminum and Hortense claims conveyed the same by divers mesne conveyances to the appellant, without consideration.

It was found by the Court, that neither the locators of the Hortense or Aluminum claims, nor the appellant, nor its predecessors in interest performed any assessment work upon either of said claims for the years 1904 and 1905. (R. 140). It is stated in the opinion that no evidence was offered by either the appellee or the appellant tending to bear directly upon the question as to whether any such assessment work was done.

The appellee proved that the proof of assessment work had not been filed as authorized by statute, undertaking thereby to raise the statutory presumption that such assessment work had not been done.

The Clerk of the Probate Court testified that he had searched his records, and that between the first day of January, 1900, and the 30th day of December, 1907, he found but two proofs of labor, one of which was filed on the 8th day of January, 1905, and the other on the 28th day of December, 1906.

Counsel for the appellee thereupon offered certified copies of such proofs for the purpose as stated by him, without objection from opposing counsel, "of showing in connection with the testimony of the witness, that there have been no satisfactory proofs of labor filed for any year prior to the year 1906." (Opinion R. 171). These proofs are marked "Exhibits Q and R" and appear at pages 51 and 52 of the Record. The proofs speak for themselves, and are manifestly insufficient and without effect.

Exhibit R makes no reference to work done in either of the years 1904 or 1905.

Exhibit Q does refer to work done in 1903 and 1904.

In the Supreme Court of New Mexico the appellant admitted that its affidavit was objectionable upon two grounds:

First: That it was not filed within the time required by the Act.

Second: That it did not give the name or names of the person or persons who performed the work, other than that it was done and performed by the appellant. (Opinion R. 170).

The appellant contends in its brief filed in this Court that this affidavit was sufficient under the New Mexico statute to raise a presumption that the assessment work was done.

The Supreme Court of New Mexico and the trial court both held to the contrary, and such holdings were not assigned as error in either the Supreme Court of New Mexico or in this court.

Appellant contends, however, that these affidavits, though ineffective as constituting the statutory proofs of labor, should be regarded as evidential, with the same effect as if the affiant had appeared at the trial and testified to the facts which are set forth in his affidavit.

The Trial Court regarded such exhibits as merely establishing the negative fact for which the plaintiff was contending, to-wit, that they being insufficient and no other proof having been filed, the statutory proofs of labor had never been filed, and that therefore, under the decision of its Supreme Court of New Mexico in the case of Upton

against Santa Rita Co., the burden of proving that assessment work had been done, was shifted upon the appellant. The issue thus raised constitutes one of the assignments of error and will be considered later.

On the first of April, 1905, the appellee located the Lulu and Agnes claims upon territory embraced within the lines of the Hortense and Aluminum. The notices of location of these claims described the same as being situated in the County of Dona Ana, and as beginning at a monument of stones tied to a railroad yard limit post on the line of the Southern Pacific Railroad.

It was contended at the trial that these notices of location were indefinite. The court found to the contrary. Such finding was assigned as error to the Supreme Court of New Mexico, and that court held that it would not disturb it. (R. 172). The contention has been abandoned by appellant in its assignments of errors and brief in this court.

If it be determined in favor of the appellee that the Court properly found that the assessment work had not been done upon the Hortense and Aluminum claims, then the right of the appellant to the territory covered by the Lulu and Agnes falls, without respect to the other questions raised by the assignments of error and argued in appellant's brief.

On the 2d of August, 1905, the appellant made application to the Land Office for a patent for the International, Hortense and Aluminum claims. The application was accompanied with a proof of posting of the plat and notice. The proof was to the effect that such plat and notice had been posted on the 10th of June, 1904, and consists of the affidavit of two persons, executed before a Notary Public

in the State of Texas, and not before an officer authorized to administer oaths within the land district where the claims are situated.

On the 23rd of October, 1905, the Receiver of the Land Office accepted from the appellant the amount required by the United States as the purchase price of the two claims, the Hortense and Aluminum, and issued to the appellant a final receipt.

On the 10th day of April 1906, the Commissioner of the Land Office, upon his own initiative, and upon various protests of the appellee and others, presented against the allowance of the patent, rendered his decision, finding the entry to be defective for a number of reasons, among others, that the affidavits as to posting were not executed within the Land District; that the Hortense claim contained an excess in area; that the requisite lines were not shown; that the mineral character of the land did not satisfactorily appear; and that the Aluminum and Hortense claims were irregular in shape, and no sufficient reason was shown for the failure to conform them as near as practicable with the United States system of public land surveys.

The appellant was granted sixty days in which to show cause why the entry should not be canceled.

Notwithstanding this adverse decision the appellant made no effort to relocate the ground. In May, 1906, the appellee re-located the territory embraced within the Lulu and Agnes claims, and located other territory adjacent and contiguous thereto, which territory so re-located and located, was covered by five claims, named respectively, the Lulu, the Agnes, the Lynch, the Tip Top and the Aurora.

The appellant filed with the Commissioner of the Land Office numerous affidavits and exhibits, designed to over-

come the above mentioned objections, and among them, certain affidavits executed before a Notary Public within the Land District, showing the fact of the seasonable posting on the land.

On the 4th of September, 1906, the Commissioner of the Land Office, after a full hearing, rendered his decision canceling appellant's entry. From such decision the appellant appealed to the Secretary of the Interior.

On the 9th of September, 1908, the Secretary rendered his decision upon such appeal, whereby he affirmed the decision of the Commissioner of the Land Office, and held the entry for cancellation. This decision is set forth in full in the eighth Finding of Fact. (R. 144-149).

It appears that the Secretary considered it necessary to discuss but one feature of the case, namely, the original affidavit as to posting.

He held that, the affidavit was fatally defective; that such defect was not a mere irregularity which might be cured by the subsequent filing of a properly verified affidavit; that the observance of the statutory provisions is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. That the register was without authority to direct the publication of the notice, and that the notice was a nullity and ineffectual for any purpose, and, "the patent proceedings, therefore, fail, and the entry will be canceled."

The Secretary continued:

"The appellant company puts forward a further and alternative contention, to the effect that even if the entry should be considered defective, yet it should be submitted for equitable consideration under said sections 2450 and 2457 of the Revised Statutes. This

disposition can not be made of the case, *for the reason that the record shows that there are alleged adverse claims.*" * * * * (R. 149).

On the 24th of November, 1908, and while the appellant still had the right under the rules to apply for a rehearing, it appeared voluntarily and waived its right to ask a review, and thereupon such decision and the cancellation of the entry became final and the entry was canceled on the records of the Land Office. (R. 149).

On the 11th of September, 1908, two days subsequent to the decision by the Secretary of the Interior, and six weeks prior to the waiver by appellant of its right to ask for a review of the Secretary's decision, the appellant located the territory embraced within the Hortense and Aluminum claims, such territory being then a part of the territory covered by the five claims as aforesaid by the appellee.

The appellant subsequently made application to patent the claims so re-located in September, 1908, and the appellee adversed, and duly brought this suit.

The appellant alleged that the appellee had not performed its assessment work upon the claims located by him, but evidence was duly submitted and the Court found upon sufficient evidence that appellee had done the necessary assessment work.

The only substantial contention of the appellant is that the territory embraced within the original locations of the Hortense and Aluminum claims was by virtue of the entry attempted to be made in August, 1905, segregated from the public domain, and that, therefore, the attempted locations of the five claims by the appellee were not upon unappropriated public domain, and were void.

The appellant furthermore contends, without respect to any of the substantial issues heretofore suggested, that

the appellee neglected to prove that the territory so located by him was a part of the public domain, and that therefore, the appellee, having failed to affirmatively establish his case, has no standing in Court.

This contention is purely technical, and as we shall hereafter indicate, is without merit.

To recapitulate, the various locations and proceedings may be stated in their chronological order, and with their respective dates, as follows:

Prior to December 5, 1900, the El Paso Brick Company, appellant, was organized, and in possession of the International claim.

On December 14, 1900, Rogers and others located the Aluminum claim.

On March 31, 1902, Rogers and others located the Hortense claim.

Prior to April, 1905, the Hortense and Aluminum claims were conveyed to the appellant without consideration.

No assessment work was done upon the Hortense and Aluminum claims for the years 1904 and 1905.

April 1, 1905, the appellee located the Lulu and Agnes.

August 2, 1905, appellant made application for patent for the Hortense and Aluminum, and obtained his final receipt.

April 10, 1906, the Commissioner of the Land Office, rendered decision that entry was defective, and ordered appellant to show cause why the same should not be canceled.

May, 1906, appellee re-located the Lulu and Agnes, and located the Lynch, Tip Top and Aurora.

September 4, 1906, the Commissioner of the Land Office, after hearing, rendered decision canceling the entry.

September 9, 1908, the Secretary of the Interior affirmed the decision of the Commissioner of the Land Office

September 11, 1908, appellant re-located the Hortense and Aluminum.

November 24, 1908, the appellant waived before the Secretary its right to ask for a review of the Secretary's decision, and the decision and cancellation of the entry became final.

Upon the foregoing facts and the pleadings appellee respectfully submits the following propositions:

I.

THE FINDING OF THE COURT THAT NO ASSESSMENT WORK WAS DONE UPON THE HORTENSE AND ALUMINUM CLAIMS FOR THE YEARS 1904 AND 1905 IS SUSTAINED BY THE EVIDENCE.

II.

IT IS ADMITTED BY THE PLEADINGS THAT APPELLANT DID NOT RESUME WORK PRIOR TO APPELLEE'S LOCATIONS OR RELOCATIONS.

III.

APPELLANT HAD THE BURDEN OF PROVING RESUMPTION OF WORK BEFORE LOCATION BY APPELLEE.

10

IV.

THE FINAL RECEIPT ISSUED TO APPELLANT IN THE LIGHT OF THE SUBSEQUENT ADJUDICATION REJECTING APPELLANT'S APPLICATION FOR PATENT AND CANCELING SUCH FINAL RECEIPT WAS INEFFECTIVE TO SEGREGATE THE LANDS FROM THE PUBLIC DOMAIN PENDING THE ADJUDICATION AS TO ITS VALIDITY, AND THIS WITHOUT RESPECT TO WHETHER SUCH FINAL RECEIPT WAS VOID AB INITIO OR ONLY VOIDABLE.

V.

THE ENTRY OF APPELLANT WAS VOID AB INITIO AND A NULLITY.

VI.

THE TERRITORY EMBRACED WITHIN APPELLEE'S CLAIMS WAS A PART OF THE PUBLIC DOMAIN.

VII.

THE ORIGINAL LOCATIONS OF THE HORTENSE AND ALUMINUM WERE VOID FOR THE REASON THAT THE LOCATORS WERE DUMMIES USED BY APPELLANT TO THE END THAT IT MIGHT EVADE THE UNITED STATES LAW AND LOCATE MORE THAN TWENTY ACRES OF LAND IN ONE CLAIM.

I.

THE FINDING OF THE COURT THAT NO ASSESSMENT WORK WAS DONE UPON THE HORTENSE AND ALUMINUM CLAIMS FOR THE YEARS 1904 AND 1905 IS SUSTAINED BY THE EVIDENCE.

This finding of the court is assailed in the eleventh and twelfth assignments of error, which are as follows:

"Eleventh. Said court erred in not holding that the affidavit made by W. F. Robinson, president of appellant, introduced in evidence by appellee and which showed that appellant had done the annual labor of One Hundred (\$100.00) Dollars required by the Statutes of the United States on and for each of said "Hortense" and "Aluminum" claims during and for the year 1904 was not evidence of the facts stated in such affidavit and particularly the fact that such work had been done.

Twelfth. The said court erred in not holding that the affidavit of W. F. Robinson introduced in evidence by the appellee, and which showed that the appellant had done and performed the annual labor of One Hundred (\$100.00) Dollars required by the Statutes of the United States to be done on mining claims each year for and on both said "Hortense" and "Aluminum" claims for and during the year 1904, said affidavit being the only evidence on that point, was not conclusive proof that appellant had done the annual labor aforesaid on and for each of said claims during and for the year 1904." (R 159)

Counsel for appellant in their brief depart from these assignments and from the position assumed by the appellant in the Supreme Court of New Mexico, and contend that such finding of the court is erroneous upon the following grounds:

(a) *That the affidavit of Robinson was sufficient under the New Mexico statute.*

(b) *That the New Mexico statute conflicts with, and must give way, to the Federal statute; and*

(c) *(being the only ground covered by the assignments of error) that the affidavit is evidence of all the facts it recites.*

These contentions will be considered seriatim.

(a) *The affidavit was insufficient.*

Section 2315 of the Compiled Laws of New Mexico of 1897, is as follows:

"The owner or owners of any unpatented mining claim in this Territory, located under the laws of the United States and of this Territory, shall, within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character, and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be *prima facie* evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall in any contest, suit or proceedings touching the title to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

Prior to the trial this statute had been construed by the Supreme Court of New Mexico.

Upton vs. Santa Rita Mining Co., 14 N. M. 96; 89 Pac. 275.

The appellee sought to show that no affidavit of the character provided by the statute had been filed within the time prescribed and hence to throw upon the appellant the burden of proving that such work had in fact been done.

For this purpose it was proven that the only affidavits on file were made and filed long after the expiration of the statutory period, and that the affidavits did not conform to the statutory requirements. The date of recording of these affidavits showed that they were not filed within the time required by the statute in order to have the effect of *prima facie* evidence of the facts stated in them.

The affidavit is also defective in that it did not state the name or names of the person or persons who performed the work.

As stated in the opinion of the Supreme Court of New Mexico it was admitted by counsel for appellant before that court that the affidavit was defective in these two particulars. Despite this admission and the fact that such ruling is not questioned by the assignments of error in either the Supreme Court of New Mexico or this court, counsel for appellant argue in their brief in this court that the affidavit was sufficient in that it stated that the work was done by the El Paso Brick Company and that it was filed in time, because the provision of the New Mexico statute as to time should be construed as being directory only.

It would seem to us that the construction given the statute by the Supreme Court of New Mexico will, under the general rule of this court, prevail.

It seems, however, manifest that the language of the statute, "the name or names of the person or persons" repels the interpretation sought to be given it by counsel.

Nor are we impressed with counsel's reasoning, that the requirement as to the time of filing should be construed as being directory only.

This argument is based upon the proposition that the statute in question should be strictly construed for the reason that it is "undoubtedly in derogation of the common law right of the locator." The statute is primarily for the benefit of the locator. It enables him, if he has actually caused the assessment work to be done, to prepare and file affidavits made by the persons who did the work, and thus, in the event that the doing of his assessment work should be at any time challenged, permits him to establish the fact by evidence which but for the statute would be incompetent.

If the provision that the affidavits should be prima facie evidence that the assessment work had been done had been omitted from the statute, and it had simply provided that unless a locator should file affidavits within sixty days after the doing of the assessment work, the burden of proof should be upon him to establish that he had done it, then the statute would be in derogation of the right of the locator, but even then we do not believe that under the recognized rules of interpretation, the requirement as to time should be regarded as directory only.

Nor is the statute in any sense in derogation of a common law right. The whole subject of mining locations and the right of a person to acquire rights in mineral lands is foreign to the common law. It rests entirely upon statute.

It is significant that the affidavit was not filed until June, 1905, a little over two months after the appellee had by his diligence or good fortune discovered valuable mineral upon this abandoned territory.

The appellant had in the International claim consisting of over 130 acres (more than the aggregate of appellee's five claims), a super abundant supply of the red shale which it used in its business of manufacturing brick, and obviously abandoned the Hortense and the Aluminum as valueless to it. It was not until the appellee discovered deposits of valuable fire clay upon the territory which it had formerly owned, that the appellant, desirous to avail itself of the fruits of appellee's enterprise, became active in its efforts to file proofs and secure patents.

(b) *The New Mexico statute does not conflict with the Federal statute.*

This contention of counsel for appellant is not covered by the assignments of error and was not raised before the Supreme Court of New Mexico, and under the rule adopted by this court will perhaps not be considered by it.

We submit, however, that in any event the point is without merit.

Idaho has a statute similar to that of New Mexico. The only difference, as pointed out in appellant's brief, consists in that the Idaho statute provides that the failure to file the affidavit shall be considered prima facie evidence that the labor had been done, whereas it is the provision of the New Mexico statute that such failure shall throw the burden of proof upon the owner of the claim to show that such work has been done.

Neither statute is in conflict with Section 2324 of the Revised Statutes of the United States. That statute provides that upon a failure to do the assessment work the claim shall be open to re-location, and the courts have held that in cases where the fact of the doing of the assessment work is an issue, the general principle of law that the burden of proof is upon him who asserts a forfeiture is applicable.

We agree with counsel that the construction of a statute becomes part and parcel of it, and we question very much the validity of any enactment which would be inconsistent with the construction which this court had put upon a Federal statute.

The New Mexico and Idaho statutes, however, do not tend to affect the construction or meaning of the Federal statute. They simply go, as stated in *Lindley on Mines*, Section 636, to the nature, degree and effect of evidence, and are therefore, as concluded by that eminent authority on mining law, unobjectionable.

It is stated in counsel's brief that in Idaho and New Mexico alone is the Federal statute so applied.

It appears, however, that the congress itself in March, 1907, enacted with respect to the Territory of Alaska, as follows:

"the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the

time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements."

Federal Statutes (Supplement 1909), p. 25.

It would seem, therefore, that congress had prior to the decision by the Supreme Court of New Mexico in *Upton vs. Santa Rita Mining Company*, expressed its approval of the wisdom of the New Mexico statute, and it is a fair deduction from such enactment of congress, in conjunction with the fact that congress did not amend paragraph 2324 of the Revised Statutes, that congress regarded the New Mexico statute not only as not in conflict with the Federal statute, but as being in harmony with and supplemental to it.

No possible injustice can result from the statute. The appellant could have availed itself of it if it had so pleased. At the trial counsel knew of the New Mexico statute and of its construction by the Supreme Court of that Territory. They of necessity knew that the appellee would prove appellant's failure to file the proof, and thus throw upon it the burden of establishing that the assessment work had been done. They were not, therefore, taken by any surprise, and yet, as appears by the findings, they offered not one scintilla of evidence as to any assessment work during the years 1904 and 1905.

As we have seen they became active in the spring of 1905, immediately after the valuable discoveries of appellee; and had any assessment work been done within a few months prior to their awakening to the value of this abandoned territory, the evidence of it would certainly at that time have been available. The conclusion is inevitable that there was no such evidence for the very sufficient reason that no such work had been done.

As we have stated, the entire subject of mining locations rests upon statute; it follows that except as restrained by positive act of congress a state or territory has the right to impose such conditions as it may see fit.

2 Lindley on Mines, Section 636;

1 Lindley on Mines, Section 249;

Providence G. M. Co. vs. Burke, 6 Ariz. 323. 57 Pac. 641.

It was therefore within the province of the legislature of New Mexico to provide for a record of the performance of the required annual labor or impose and to prescribe the legal effect of noncompliance with its provisions, and such statutes should be given a reasonable, rather than a strict construction.

(c) *The affidavit is ineffective for any purpose other than to establish the fact that no proof of assessment work for the years 1904 or 1905 was recorded in pursuance of the Territorial statute.*

The appellee proved by the recorder that no affidavits were filed by or on behalf of appellants prior to 1907 except two. Certified copies of these two affidavits with the certificates of record indorsed on them were then offered in evidence by appellee "for the purpose of showing in connection with the testimony of the witness that there had been no satisfactory proofs of labor filed for any year prior to the year 1906." (Opinion p. 171.)

It is apparent therefore that the affidavits were not offered generally, but for a limited purpose only and that such purpose was clearly stated and sharply brought to the attention of the court and opposing counsel. Nevertheless it was argued before the Territorial Supreme Court, and it is now insisted that, notwithstanding the limited purpose for which they were offered, the affidavits must be con-

sidered as evidence of the facts stated in them, and hence that they constitute evidence tending to prove that the work was actually done.

It must be conceded that as a general rule, *ex parte* affidavits are not competent evidence upon the trial of an issue in favor of the party making them unless made so by statute; and in order to be used as evidence when permitted by statute, the statutory provisions must be strictly complied with. Such statutes, being in derogation of the common law, are strictly construed, and must be strictly complied with.

I Enc. Pl. & Pr. 334-335.

II Wigmore on Evidence, Sec. 1384.

It is apparent, therefore, that the affidavits were not competent evidence in favor of the appellant, and must have been excluded had it offered them as evidence of the facts stated in them.

Hence, unless the appellee made the affidavits themselves, as a statement of the facts set forth in them, evidence, notwithstanding the express limitation of the purpose for which they were offered, they can not be considered as evidence except for the particular purpose stated.

The correct rule is, as gathered from the authorities, that a party may offer a document for a particular purpose, especially one not having reference to the truth or otherwise of the facts set forth in the document, and that when so limited, the document can be considered only for the purpose for which it was offered.

In *Succession of Murray*, 41 La. Ann. 1109, 7 So. 126, a will was offered in evidence for the purpose of showing that it contained certain defects in form. It was contended that having been offered in evidence, the document was in

evidence for all purposes, notwithstanding the limited purpose for which it was offered.

This contention was overruled, and in the syllabus, prepared by the court, the rule is thus stated:

"A party, in offering written documents in evidence, has the right to restrict their effect as evidence to a definite purpose, and is not compelled to offer them for whatever they may be worth as evidence."

In *St. L. & S. F. Ry. Co. vs. May*, 53 Tex., Civ. App. 257, 115 S. W. 900, an action to recover damages for delay in transporting cattle, the defendant offered in evidence a portion of the claim presented by the plaintiff for the purpose of showing that the claim for damages presented by the plaintiff was less than that claimed in the action. Against objection the plaintiff was permitted to introduce the remainder of the claim which set forth certain alleged negligence of the defendant. This was held error, the court saying:

"The rule which permits the plaintiff to introduce the entire instrument when the defendant had offered only a part is based upon the principle that a reading of the entire instrument is essential to a proper understanding of the portion offered, and is justified only when that is the case. * * There is no legal reason why the application of this rule should be made use of merely to get before the jury declarations or statements which are otherwise inadmissible."

In *Henderson vs. Givens*, 16 Ala. 261, the plaintiff offered in evidence the record of a suit in another court for the purpose of showing that a judgment had been rendered. The record being in evidence, it was sought to be used by the defendant as proof beyond the purpose for which it was offered, but this was not permitted, the court saying:

"The record of the cause in chancery * * was clearly admissible for the purpose of showing a final

decree had been rendered adverse to the plaintiff. * * The defendant might show that it did not establish the facts assumed; but the plaintiff's having used the record for a legitimate purpose, did not entitle the defendant to avail himself of it, as proof of facts of which it would not have been primary evidence for him."

In *Chesapeake Bank vs. Swain*, 29 Md. 483, the action of the lower court in refusing to allow defendant to use other items of account, which it was claimed explained or controlled the items offered, where the items were offered for the purpose of verifying the testimony of a witness, was upheld, the court saying:

"The single entry in the bank book, kept by the plaintiffs with the defendant, of the deposit made on the 30th day of December, 1861, was offered in evidence by the plaintiffs, for the purpose of verifying the testimony of the witness Habliston, and of showing the nature of the particular entry made by the defendant at the time, as indicative of the character of the deposit in question. It was not offered to show the general state of the account contained in the book, but simply to show the character of one entry therein, as that might reflect upon the nature of the contract under which the deposit was made. The plaintiffs, therefore, were not bound to put in evidence all the other entries in the book; and when the books were placed in the power of the defendant, to be used by it as evidence for any legitimate purpose that might be thought proper, we think nothing more could reasonably be required."

So in *Abbots vs. Pearson*, 130 Mass. 191, the court held that the introduction of an item in a book for the purpose of fixing a date, did not make the whole book or other entries not explaining the one introduced, competent.

The argument of the appellant upon this question, is seemingly based upon a misapplication of the rule of evidence, denominated by Professor Wigmore, a rule of completeness, in which counsel for the appellant, and some courts, have confused the rule with a case where evidence is offered for a purely collateral purpose as in the instant case. The rule is discussed at length by Wigmore, in 2 Wigmore on evidence, Section 2112, et seq.

The rules with reference to the admission of a portion of a paper or document, has been the subject of numerous discussions by courts and text writers, and the rules applicable thereto may without much difficulty be deduced. Wigmore probably has the most philosophical and orderly discussion of the whole subject in sections of his work above referred. But, ignoring Wigmore's exact language, the rules may be fairly stated as follows:

1. Where a part of a document is introduced, or the whole introduced and only a part used, as primary evidence of the facts stated in the document, all the remainder that explains or qualifies the part introduced or used, may be introduced by the other party, in order that the particular part may be presented in its real effect and meaning.
2. When an item or items of an account are introduced, other items are used for evidential purposes to effect or throw light upon the particular item or items introduced.
3. Where a document or a part of a document is introduced for a specific purpose, the remainder can not be used evidentially by the opposite party unless primarily admissible on his part.

Most of the cases cited by the appellant come within the first or second rules. In most of them the remainder of the document where only a part was offered, was offered by the opposite party, as in *Payne vs. Wilson*, 146 Fed. 488.

In others the remaining portion of the document was held to be primary and admissible on the part of the other party as in *Greenleaf's Lessee vs. Birth*, 5 Peters 131.

In others the remainder of the document was used without objection, as in *United States vs. Homestead Mining Co.* 117 Fed. 481.

In some, as in *Sill vs. Reese*, 47 Cal. 340, general language is used, which if taken literally bears out the view of counsel, but the discussion is of the most general character and the facts of the case are entirely different from those in this and the cases cited in this brief.

In this case the affidavits were vitally defective and it was so conceded by appellant. The plaintiff offered them for the sole purpose of showing that they were not in compliance with the statute and hence that in legal effect, no affidavits at all had been filed, and the burden of proof had in consequence been shifted to the other party. In any case where it is claimed that an affidavit is insufficient under the statute, obviously the best evidence of what the affidavit does or does not contain, is the affidavit itself. Without proof of the loss or destruction of the affidavit or its record, a party claiming the affidavit to be insufficient would be bound to introduce the affidavit as proof of what it did or did not contain. If a plaintiff seeks to cast upon his opponent the burden of proving that the annual work on a mining claim had been done because of lack of a proper affidavit, he must of necessity introduce the affidavit, if one has been filed, for the purpose of proving its own insufficiency. If, notwithstanding the fact that he offers it for that sole purpose and carefully limits his offer to that one purpose, the affidavit nevertheless ipso facto becomes evidence for the other party of every fact stated in it, the statute might as well be repealed.

It must be borne in mind that the affidavit would be entirely inadmissible if offered by the defendant. It was not in fact offered in evidence by the defendant at the trial. It now seeks to avail itself of the affidavits as evidence that the work was done, notwithstanding the obvious insufficiency of the affidavits which could only be evidence in its favor if sufficient under the statute. The case ought to be governed by the rule laid down by *Succession of Murray*, 7 So. 126, 41 La. Ann. 1109, that a document may be introduced for the sole purpose of showing its own defects, without thereby making it evidence in favor of the other party as the matters stated in it.

To illustrate: Suppose it were to be a material inquiry whether a certain document was written upon blue paper. A party introduces it for the sole purpose of showing that the paper on which it is written is not blue but white. Could the opposite party thereupon claim that every statement in the document had thereby been made evidence? Could it be claimed that a document so introduced and every statement in it, however otherwise inadmissible, had by its introduction for that special purpose been made evidence against the party offering it? The illustration shows the unsoundness of the rule for which the appellant contends.

Instances might be multiplied in which a document, introduced for an entirely collateral purpose, might be used as evidence in favor of a party who could not introduce it himself.

The quotation from 17 Cyc. 52, contained in appellant's brief, on its face sustains his view, but when the authorities on which the statement is based are examined, they wholly fail to lay down any such doctrine. All of them, so far as they are available at this writing, are cases where a document was used by one of the parties, and it was held that he

could not complain if his opponent used it, but in every case the purpose of introducing the document was not expressly limited, but either the whole or a part of it was introduced or used generally. The text based upon the case of *Winants vs. Sherman*, 3 Hill 74, where the bare statement is contained, and the citation contrary of the case of *Succession of Murray*, *supra*, seems to be a simple case of an author's selection of authority, with no more force than such selection by any other person.

At page 30 of appellant's brief, it is said:

"But even conceding the statute should be construed to impose upon the relocater the duty of proving that the statute had not been complied with, the plaintiff could have accomplished that result—conceding *arguendo* the correctness of the construction put upon the statute by the court below—by showing that the affidavit here filed was not recorded within the statutory period of time, and then resting his case. Having gone beyond the real needs of his case and introduced the whole affidavit with all of its facts for the purpose of getting the benefit of some of the language therein contained, he is certainly in no position to assert that the court should not consider the affidavit in so far as it is beneficial to the defendant company."

This argument is confuted by that portion of appellant's brief in which it is contended that the statutory requirement as to the time within which the proof must be recorded is directory only. Counsel for appellee had clearly the right as a matter of precaution to prove the insufficiency of the affidavit in as many particulars as possible.

II.

IT IS ADMITTED BY THE PLEADINGS THAT APPELLANT DID NOT RESUME WORK PRIOR TO APPELLEE'S LOCATIONS OR RELOCATIONS.

Before entering upon the discussion of where the burden of proving resumption of work rests, after the plaintiff in an adverse suit has proven the failure to do assessment work for the two calendar years preceding his location, we will invite the court to examine into the pleadings with a view to ascertaining whether the fact of resumption or non-resumption was put in issue by defendant's answer.

The concluding portion of paragraph VII of the complaint is as follows:

"The defendant failed to do or perform or cause to be done or performed thereupon or for the benefit thereof or during or for the years 1904 and 1905 and each of said years, the annual labor and assessment work or improvements required by law in order to avoid a forfeiture thereof, and thereby and because of such failure forfeited any rights they might have had in said claims and each of them, and did not resume possession of the work upon the same at any time prior to the time of the acquirement by the plaintiff and his grantors of the premises hereabove described." (R. p. 5.)

Defendant's answer to such allegation is as follows:

"It denies that this defendant or its grantors failed to do or performed or cause to be done or performed upon said mining claims, or for the benefit thereof, during and the years 1904 and 1905, and each of said years, the annual labor and assessment work or improvements required by law in order to avoid a forfeiture thereby, and that this defendant ever forfeited any rights it had in said claims or either thereof in any way, and denies that defendant ever failed to resume

possession upon such claim, or either thereof, or at any time when such resumption was necessary for the maintenance of its rights thereto."

It will be noted that after a denial of the allegation of failure to do the assessment work for the years 1904 and 1905, which denial is equivalent to an allegation that it had done the assessment work for such years, the defendant makes this qualified denial of the allegation with respect to resumption. The language is, to repeat the quotation, "denies that defendant ever failed to resume possession upon such claims or either thereof or at any time *when such resumption was necessary for the maintenance of its rights thereto.*"

It is provided by section 2685, subsection 47, of the Compiled Laws of New Mexico, 1897, as follows:

"Every pleading must be subscribed by the party making the same or his attorney, and when any pleading is verified, every subsequent pleading except a demurrer must be verified also."

Sub-section 67 of such section provides that:

"Every material allegation of the complaint not controverted by the answer * * * shall, for the purposes of the action, be taken as true."

Complaint and answer are both verified. The only language in the answer tending to constitute a denial of the plaintiff's allegation of non-resumption of work which is the last quoted portion thereof, is manifestly ineffective to create an issue, and for more than one reason.

In the first place, it is a conclusion of law pure and simple. It is a denial that the defendant failed to resume possession at any time when the resumption was necessary for the maintenance of its rights. The denial is thus dependent upon the legal proposition as to whether the resumption was necessary to maintain appellant's rights.

Under no circumstances could the officer of the appellant who verified the answer have been charged with perjury by reason of such denial. The statement that in its opinion it was never necessary to resume in order to maintain its rights would relieve him from all imputation of a false denial.

Furthermore, the preceding part of the paragraph, separated from the denial of the discussion only by a comma, destroys any possible effect that it might be argued to have. The appellant precedes its plea to the allegation of non-resumption by an unequivocal averment, to whose truth its president swears, that it had performed the assessment work for the years 1904 and 1905, and having thus established that it was in no wise necessary for the maintenance of its rights that it should resume possession or do any work at all upon the claims prior to the 31st of December, 1906, in order to maintain its rights thereto, it qualifies its allegation of non-resumption by adding the words "when it was necessary for the maintenance of its rights."

Had the appellant intended or wished to traverse the allegation of non-resumption it would not have been satisfied with this qualified denial, but would have added an affirmative allegation that it had in good faith done work upon the claims in 1906 prior to appellee's locations.

We submit that under all rules of pleading, plaintiff's allegation of non-resumption is not traversed, and that there was no necessity for the plaintiff to offer any evidence in support of it.

After the 9th paragraph of its answer, the defendant denies each and every allegation contained in the complaint not expressly admitted in the answer to be true.

We submit that the quoted portion of the answer is equivalent to an express admission of the allegation.

The effect of such a general denial after a categorical plea to the various allegations of the complaint is treated by us at length in a subsequent portion of our brief upon another subject.

We will content ourselves therefore at the present time with the statement that the allegations in the complaint stand admitted.

III.

APPELLANT HAD THE BURDEN OF PROVING RESUMPTION OF WORK BEFORE LOCATION BY APPELLEE.

Assuming arguendo, that the pleadings do not constitute an admission that the appellant did not resume work prior to appellee's locations and re-locations, we submit that it was unnecessary for the appellee, having established the fact that the assessment work for the years 1904 and 1905 had not been done, to offer proof that the appellant had not resumed work.

(1). It has been shown elsewhere in this brief that the failure to file an affidavit of assessment work for the year preceding appellee's locations within the time required by the statute of New Mexico, threw upon the appellant the burden of proving the performance of such work. There being no evidence at all upon the subject, the presumption created by the failure to file the affidavit became conclusive, and it stands as proven, that such work was not done.

It is now contended that the appellee must also prove non-resumption of work by the appellant before appellee's location. There was no proof at all upon the subject of such resumption, and it is appellee's contention that appellant must assume the burden of proving such resumption, in order to relieve itself of the previously accruing forfeiture.

or to show that the ground was not open to relocation on account of its failure to do the necessary work or improvements during the preceding year.

It is conceded, of course, that the failure to perform the annual work or improvements does not in itself amount to a forfeiture. The ground embraced within the claim, upon which the work is not done, simply becomes open to location, and upon re-location by a third party, the forfeiture becomes complete. But it is well settled that where the work for a given year is not done, the ground at once becomes subject to location, and upon location, the possessory right at once vests in the re-locator.

2 Lindley on Mines, Sec. 645.

Though by the mere failure of the owner to perform the work, the forfeiture has not become complete, yet it is *prima facie* complete, it has progressed so far as to make the ground open to relocation and to put the rights of the owner at the mercy of anyone who sees fit to relocate. The absolute right of the original locator to hold the claim is lost, and while he may revive or re-establish his right if no right of another has intervened, yet once it is shown that the ground is open to location, it would seem logical that the burden of proving that such condition no longer exists, or that the ground had again ceased to be open to location, should devolve upon the one claiming the revival or re-establishment of his original rights.

Aside from the situation created by the New Mexico statute, it is the undoubted rule that a forfeiture for failure to do the annual work must be established, and the burden is upon the one claiming it to establish it clearly and satisfactorily. But where such failure is clearly and satisfactorily shown, and the abhorrence of the law to forfeitures has been overcome by clear and satisfactory proof, no reason

is perceived why the original locator should not assume the burden of relieving himself from the effect of the proven forfeiture.

Even upon the question of failure to perform the annual work, the requirement of strict proof of such failure is not of universal application.

Proof that no work or improvements have been done *upon* the claim itself, throws upon the locator the burden of proving that work done elsewhere is for the benefit of the particular claim, and hence applies as the annual work upon such claim.

Little, Dorith & Co. vs. Arapahoe & Co., 30 Colo. 431, 71 Pac. 389;

Sherlock vs. Leighton, 9 Wyo. 297, 63 Pac., 580.

In those cases it was held that the showing that no work had been done upon the claim involved, threw upon the owner the burden of showing that some other work had answered the purpose and of escaping from the effect of the apparent forfeiture.

The logic of this doctrine would lead to the conclusion that when a *prima facie* case of forfeiture is made out, the burden of escaping the consequences of such *prima facie* showing is shifted and proof must be made by the one seeking the escape.

Ordinarily the rule is that a condition once shown is presumed to continue until the contrary appears. So when an apparent case of forfeiture and right to relocate has been established by showing that the required work has not been done on the claim, the presumption is that the prior locator has abandoned it, and the burden of overcoming the forfeiture thus presumptively shown is upon the other party.

In the earlier case of *Hall vs. Kearney*, 18 Colo., 505, 33 Pac. 373, the rule announced in the case above cited was laid down, and it was held that where it was shown that no work had been done on the claim in controversy, the burden was upon the owner to prove that other work answered the purpose of work upon the particular claim.

The cases cited by appellant do not touch the point. Some of them lay down the familiar and conceded rule that forfeitures are not favored and must be clearly shown, and in others that where a resumption of work is shown the claim is not forfeited. But in all of them, and in all the cases involving the right of the locator to resume work and thus defeat the forfeiture, an actual resumption was shown or the owner assumed the burden of showing such resumption, and the discussion was as to whether the acts shown amounted to a resumption in good faith.

The case of *Power vs. Sla*, 24 Mont. 243, 61 Pac. 468, which is apparently relied upon by the appellant, does not involve the point under consideration. The pleading which was attacked in that case simply alleged that the plaintiffs failed to perform \$100 worth of work and labor on the claim, but did not allege that they had not expended \$100 in improvements. As the Federal statute provides for the doing of labor or improvements on a mining claim, it was held that the answer must negative both propositions and allege that neither labor nor improvements had been done, else it was bad. It was not alleged that the plaintiff had not resumed work, nor was it held necessary so to allege, nor was the question of resumption of work at all involved. The language quoted by appellant simply had reference to the alleged defect before the court, the failure to negative the idea that improvements as well as labor had not been performed.

If the extreme position taken by the appellant be sound, the one asserting a forfeiture for failure to perform annual labor or improvements must negative every possible excuse for not doing the work or improvements. The matters which will excuse such performance are familiar, and if the views of appellant are correct, it would be necessary for the relocater to allege and prove not only the failure to perform the annual work or improvements and the non-resumption of work, but also to allege and prove that he had not by adverse possession or show of force prevented the doing of the work and to negative by pleading and proof any other excuse for not doing the work. No such rule has ever been hinted at by any court.

- Providence Etc. Co. vs. Burke, 6 Ariz. 323.
 Quigley vs. Gillett, 101 Cal. 462, 35 p. 1040.
 Hammer vs. Garfield Etc. Co., 130 U. S. 291.
 Honaker vs. Martin, 11 Mont. 91, 27 p. 397.
 Beals vs. Cone, 27 Colo. 473, 62 pp. 948, 958.
 Johnson vs. Young, 18 Colo. 625, 34 p. 173.
 Bishop vs. Baisley, 28 Ore. 119, 41 p. 936.
 Axiom M. Co. vs. White, 10 S. D. 198, 72 N. W. 462.
 McCullough vs. Murphy, 125 F. 150.
 Callaghan vs. James, 141 Cal. 291, 74 p. 853.
 Sherlock vs. Leighton, 9 Wyo. 297, 63 p. 581.

(2). "To resume work" means to re-enter upon the ground in good faith, and to prosecute the work with reasonable diligence to completion.

- McCormick vs. Baldwin, 105 Cal., 284, 37 Pac., 903;
 Honaker vs. Martin, 11 Mont., 91, 27 Pac. 397.
 Lindley on Mines (2nd Ed.), section 654, 27 Cyc. 595.
 Jordan vs. Duke, 6 Ariz. 55, 53 p. 197.
 Honaker vs. Martin, 11 Mont. 91, 27 p. 397.
 Hirschler vs. McKendricks, 16 Mont. 211, 40 p. 290.

The presumption is conclusive in this case that the appellant did not do \$100 worth of work on either claim in any year between 1901 and 1906 inclusive. Therefore, if a presumption is indulged in its favor that it resumed in 1904, and again in 1905, it must be held that it did not complete the work of resumption in either year, which shows lack of diligence and good faith and that the work was not prosecuted to completion. This is conclusive as to the locations of the "Lulu" and the "Agnes" in April, 1905.

(3). Counsel for appellant illustrate the vitality of an original location of a mining claim by dividing the varying conditions into three groups.

The third group is as follows: (A being the original locator, and B the re-locator.)

"A fails to do the annual assessment work. B re-locates after the year expires, but abandons his relocation or otherwise defaults. A then resumes assessment work. C thereafter makes a second re-location. A prevails over C."

We do not find any special materiality in this proposition, but are loath to believe that it correctly states the law.

When B relocated after A had failed to do the annual assessment work and prior to resumption by A, B became vested with an absolute possessory right and with an inchoate right which nothing but his own failure to comply with the congressional requirements could prevent from ripening by patent into a legal title. Such right thus vested in B, it seems to us, is fundamentally inconsistent with any right whatever in anybody else except the reversionary right of the United States. The forfeiture is complete. While B was relocating the ground, it was to use the language of the statute, "open to relocation in the same manner as if no location of the same had ever been made." The fact of B's relocation made the conditions such as if A's location had never been made.

We have examined with interest the two cases cited in appellant's brief in support of this proposition. There is language in both sufficient to support an argument in favor of the proposition. But we question very much whether either of them is authority for it.

In *Justice Mining Co. vs. Barclay*, 82 Fed. 554, one Cummings, complainant's grantor, was the original locator. There was question as to whether he had done the assessment work prior to 1895. Several re-locations had been made by others prior to 1895, but had been abandoned. The complainant had done the assessment work subsequent to that year. The respondents located in 1896. One of their contentions was that the re-locations prior to 1895 had had the effect of forfeiting complainant's location. It is apparent, therefore, that respondents' location in 1896 was necessarily invalid if these alleged intervening locations had been valid. The court says that the complainant never abandoned the property, and indicates its belief that the complainant, or its grantor, had performed the annual assessment work at all times. The opinion then proceeds:

"Conceding for the purpose of this opinion that complainant had failed to do any assessment work upon the ground and that it was prior to January 1, 1895, subject to be re-located, still the respondents are not in a position to take any advantage of such failure on the part of the complainant to do the assessment work." * *

"The assessment work by complainant in 1895 prior to the relocation of the ground by Hills on behalf of the respondents *and before any intervening rights by other parties had been acquired* revived its rights under the Cummings location." (Italics ours.) And referring again to the locations which it was contended divested Cummings, the court says:

"If either of said location were valid, the respondents would have no standing in court." (Italics ours.)

We conclude therefore,

First, That the language of the court's opinion does not sustain the proposition suggested by counsel for appellant; and

Second, That if it be construed to sustain it, it would be purely dictum.

Klopenstine vs. Hays, 20 Utah 45, 57 Pac. 712, being the other case cited in appellant's brief is, so far as this point is concerned, also dictum.

The facts found in that case were as follows:

The plaintiff claimed under the Jupiter claim located in 1881. The annual assessment work was not done for the year 1882; in 1883 the Juniper claim was attempted to be re-located. No work was done upon it between 1885 and 1892.

Work was resumed upon the Jupiter claim in 1885, and the annual assessment work was done continuously after said date. It was claimed by the defendant that the forfeiture of the Jupiter claim was consummated when the Juniper claim was located in 1883 and that the annual assessment work done upon such Jupiter claim from 1885 to 1897 was ineffective to revive such forfeited location.

If the location of the Juniper claim had been valid, then the question suggested in the proposition under discussion would have been squarely presented for decision; but the court holds expressly that the location of the Juniper claim was invalid. This holding was sufficient to dispose of the case. The court then does use language tending to support appellant's proposition upon the sole authority of *Mining Company against Barclay, supra*, from the opinion of which case it purports to quote.

It will be noted, however, that the quotation is not from the opinion in the Barclay case, but from the syllabus, and a reading of the opinion, as we have seen, shows a wide difference between it and the law as stated in the syllabus. To repeat, the cases are not authority for the proposition; and if they are they do not correctly state the law and should be overruled.

(4). The last clause in section 2324 of the Revised Statutes "provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location," manifestly constitute a proviso in the nature of an exception to the terms of the preceding and principal clause of the Act."

The section first sets forth the conditions essential to the maintenance of the possessory right of the locator. It then provides that "upon a failure to comply with these conditions" the ground shall be open to relocation, thus completing the enactment. Then follows the last clause, thus, as we have said, plainly constituting an exception to the proviso.

We concur in the statement of the Supreme Court of Alabama, quoted on page 35 of appellant's brief, that it does not necessarily follow that a legislature by using the term "provided" intends that which succeeded it to be a proviso or an exception.

The matter of the succeeding words may indicate a contrary legislative intent, or such contrary intent may be found in other portions of the statute.

The ordinary meaning of the word, however, if uncontrolled by any special language or circumstance, implies that that which follows it is a proviso, and, as held by this court, "the general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute."

Georgia Banking Co. vs. Smith, 128 U. S. 174, at p. 181.

The cases of Austin vs. United States, 156 U. S., 417, and Selma, Etc. R. R. vs. United States, 139 U. S., 560, cited in appellant's brief, are, it seems to us, authority for our contention.

In the Austin case the statute was that the claims of the successors in interest of Austin should be referred to the court of claims for adjudication, "provided, however, that it be shown to the satisfaction of the court that neither Sterling T. Austin, Sr., nor any of his surviving representatives gave any aid or comfort to the late rebellion but were throughout the war loyal to the government of the United States."

The court held that such proviso "made loyalty a jurisdictional fact, since the consent to the prosecution of the suit was given upon the condition that that fact should be established."

It seems to us that the language could not bear any other construction. The court of claims would look to the act for its jurisdiction, and find itself confronted at the threshold of the inquiry with the enactment that the claim is only referred to it provided Austin's loyalty be shown to its satisfaction.

In the Selma Railroad case the act appropriated \$375,000 to pay to mail contractors for mail services performed in certain Southern States before the war, "provided that any such claims which have been paid by the Confederate States government shall not again be paid." The court refers to the Confederate enactment of September 27, 1862, directing certain moneys collected from the postal service to be paid to loyal citizens of the Confederate

States, and says that it is not disputed "that the claim here in suit is of the class for the payment of which the Confederate enactment of 1862 made provision."

Then passing upon the contention made by the claimant, that it was the duty of the United States to show affirmatively that the claim was paid by the Confederate States government, the court says:

"We are of opinion that Congress intended to provide for the payment of only such claims as appeared not to have been paid by the Confederate government. As the claims described in that Act had been, at the date of its passage, outlawed by limitation or by express enactment forbidding their payment, and as Congress must be presumed to have passed that Act with knowledge of the Confederate legislation of 1861 and 1862, we can not believe that it was intended to impose upon the United States the burden of showing, affirmatively, that such claims had been paid by the Confederate government. The object of the proviso 'that any such claims which have been paid by the Confederate states government shall not again be paid,' was to indicate the class of cases which the Act embraced. * * * *

"The Act of 1877, was, in effect, an invitation to all having claims of the class described in it, which had not been paid by the Confederate States, to present them for payment out of the sum appropriated by it for that purpose; leaving those seeking the benefit of the Act to show that their claims were of that class. Besides, as the fact of payment or nonpayment by the Confederate government was peculiarly within the knowledge of the claimant or within his power—if in the power of anyone—to establish, it may well be supposed that Congress intended that a claimant, as a condition of payment by the United States, should show that his demand belonged to the class for which the Act of 1877 provided."

It is apparent that the court in such case construed the word "provided" in other than its ordinary sense, for the

reason that it found in the statute a clear intent on the part of Congress which necessitated such construction.

As in that case the fact of payment or nonpayment by the Confederate government was peculiarly within the knowledge of the claimant or within his power, if in the power of anyone to establish, so in this case the knowledge of whether or not the appellant had resumed work was peculiarly within the knowledge of the appellant, and within its power, if in the power of anyone to establish.

Counsel argue at page 45 of their brief that knowledge of resumption or non-resumption of work is readily accessible to the re-locator. Of course, such knowledge is in a sense accessible to the re-locator; but it is not so accessible to him as to the one who actually did resume the work; and the power to establish non-resumption is undoubtedly much more difficult than the power to establish resumption.

It is always difficult to prove a negative. It is especially difficult to negative resumption of work. A re-locator frequently finds it difficult to establish that the annual assessment work has not been done; but at least in assuming this burden he can ascertain by an inspection of the claim what work has been done, and can procure testimony as to its value. Resumption of work, however, as contemplated by the statute, does not call for any quantity of work at all; if five minutes before the re-locator completes the monumenting of his claim, a single man on the other side of the hill and beyond the view of the relocator on behalf of the original locator strikes a pick into the vein with the honest intention of resuming work, such resumption suffices to invalidate the re-location.

It can not be that it was the intention of Congress to impose such a burden upon a re-locator when the evidence of such resumption is peculiarly within the control of the person whose duty it is to do the work.

We have heretofore seen that the resumption of work after failure to do the annual assessment work, in order to be effective to prevent a valid re-location, must be in good faith. If, therefore, the re-locator has the burden of proving non-resumption of work, he also has the burden of proving that the work was not resumed in good faith. It would be virtually impossible for him successfully to assume such a burden, and we can not believe that such was the intent of the statute.

We will close the discussion of this topic with the following very apt quotation from the opinion of the Supreme Court of New Mexico:

"If appellant had in fact resumed work before the date of appellee's locations it could easily have shown it and it was its duty to show it. The claims in this case each covered more than one hundred acres of land. The law required one hundred dollars' worth of work. From this fact it will be seen that impossibility of clear and convincing proof by appellee that appellants had not resumed work on some part of these claims and had not performed one hundred dollars' worth of work."

(5). The New Mexico statute shifting the burden of proof does relate to the resumption of assessment work.

The Supreme Court of New Mexico says in its opinion

"When the burden by non-compliance with the statute was placed upon the appellant, it could have been shifted or met by proof either of the annual labor done at the proper time or work done before the location of appellee, but the proviso to the statute calls for an affirmative showing by the locator."

We submit that the Territorial Supreme Court in this portion of its opinion construed the statute as covering resumption work, and if so, then, under the general rule of this court, such construction will prevail.

IV.

THE FINAL RECEIPT ISSUED TO APPELLANT IN THE LIGHT OF THE SUBSEQUENT ADJUDICATION REJECTING APPELLANT'S APPLICATION FOR PATENT AND CANCELING SUCH FINAL RECEIPT WAS INEFFECTIVE TO SEGREGATE THE LANDS FROM THE PUBLIC DOMAIN PENDING THE ADJUDICATION AS TO ITS VALIDITY, AND THIS WITHOUT RESPECT TO WHETHER SUCH FINAL RECEIPT WAS VOID AB INITIO OR ONLY VOIDABLE.

The converse of this proposition is argued with much elaboration by counsel for appellant. In our opinion, the authorities cited by him are inapplicable, for the reason that they refer to the laws and the practice for the acquisition of agricultural territory exclusively. A mass of authority is adduced to the effect that land embraced in a homestead entry is segregated from the public domain until such entry is canceled upon the books of the local land office, and it is assumed that the effect of a mineral entry is the same. No authority is cited bearing upon the effect of a mineral entry except the two cases of *Murray vs. Polglase*, and *Adams vs. Polglase*, both of which are directly against counsel's contention.

We respectfully submit that there is a clear distinction between the effect of mineral and non-mineral entries, and that such distinction is based upon the fundamental difference in the respective laws for the acquisition of mineral and agricultural territory.

Rights to agricultural territory are initiated in the local land offices; whereas, rights to mineral territory are initiated by the posting of monuments and doing work upon the territory sought to be acquired.

It is to some extent correct as suggested in appellant's brief, that under special circumstances a settler may initiate a title to agricultural lands without applying to the local land office. This court has so held when strong equities prevailed, and, as stated in *Ard vs. Brandon*, 211 U. S., from its inclination to deal "tenderly with one who in good faith goes upon the public lands with a view of making a home thereon." But these special circumstances, like all exceptions, only emphasize the rule and the distinction. Rights to mineral territory may never be initiated in the local land office. Rights to agricultural territory may always be initiated in the local land office, sometimes perhaps and under exceptional circumstances elsewhere. The strength of the reasoning of the Supreme Court of New Mexico to which counsel for appellant take exception, is substantially unimpaired.

The procedure in acquiring property, the right to which is initiated by filing the application in the local land office, has developed into a necessary set of rules, which have been recognized by the courts, and thus become the established law.

One of these rules is that land upon which entry has been made in the land office, is segregated from the public domain until such entry has been canceled upon the plats of the land office.

This rule has neither application nor relevancy to mineral entries.

There is no such thing as the segregation of mineral land from the public domain by consequence of the filing of an application for a patent.

The test of whether mineral territory has been segregated from the public domain, or in other words, has ceased

to be open to location, is found in the inquiry as to whether an interest in it has vested in anybody else.

As stated by the Secretary of the Interior in the American Hill Quartz mine case, quoted with approval by this court in the case of Benson M. & S. Co. vs. Alta M. & S. Co., 145 U. S., 36 Law Ed. p. 763.

"At the outset it is proper to remark that by the mining laws of the United States, three distinct classes of titles are created, viz: 1. Title in fee simple. 2. Title by possession. 3. The complete equitable title. The first vests in the grantee of the government an indefeasible title, while the second vested a title in the nature of an easement only. The first, being an absolute grant by purchase and patent without condition, is not defeasible, while the second, being a mere right of possession and enjoyment of profits without purchase and upon condition may be defeated at any time by the failure of the party in possession to comply with the condition, viz, to perform the labor or make the annual improvements required by the statute. The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued."

At the time of the location by appellee, appellant manifestly did not have a title in fee simple, because no patent had been issued. Nor did it have a title by possession, because it had not done the required assessment work. It therefore had no interest in the premises unless it had "a complete equitable title."

We submit that the record in this case is conclusive that the appellant did not have an equitable title; the most that it can be said to have had was a claim to an equitable title, which claim, as it evidenced by the subsequent proceedings before the Commissioner of the Land Office, turned out to be unfounded.

The decision of the Secretary did not divest the appellant of the equitable title which it claimed. It was an adjudication that it never had an equitable title, and that without respect to whether the defects in the application for a patent were void or voidable, jurisdictional or otherwise.

Here was certain territory belonging to the public domain, the legal title to which was in the United States. The appellee located it. The appellant claimed an interest in it as against the United States. If such claim had been established by the appellant, then necessarily appellee's location would have been junior and ineffective. The validity of appellee's location depended, not upon whether or not the appellant *was claiming* an interest against the United States, but upon whether or not, in fact, appellant *had* an interest in the property as against the United States. The rejection of appellant's application for a patent, in which it acquiesced by waiving its right to review the decision of the Secretary and relocating the territory, is conclusive as between the appellant and the United States that the appellant had acquired no interest in the territory by virtue of its application for patent and final receipt. Appellant might, when the Commissioner of the Land Office questioned its right to a patent, have resumed its assessment work, and maintained its possessory title. It failed to do this, and, therefore, when its claim to an equitable title was ascertained by final adjudication to have been unfounded, it was left without any title, either equitable or possessory.

In the absence of legal authority, or established rule of practice, it certainly will be conceded that as a general proposition appellee's location would be valid if at the time of location appellant had no interest in the territory, even though the adjudication finally resolving the question as to whether appellant had such an interest or not, should not have been made until long after appellee's location.

The burden therefore rests upon appellant to show that it is the law that even if appellant had no interest in the territory, it was, nevertheless, for some reason, so segregated from the public domain as not to be open to location at the time appellee located it. This burden counsel for appellant assume; and undertake to establish that it is the law that an entry made in pursuance of an application for a patent to a mining claim, even if such entry should be subsequently declared invalid, segregates the land from the public domain pending such adjudication; and in support of their contention, they cite a vast mass of decisions upon the effect of homestead entries.

As has been said, the law with respect to the acquisition of mineral territory is entirely different from that with respect to the acquisition of agricultural territory. The conditions for the acquisition of the two characters of territory and the public policy with respect thereto are different.

Referring to the law as to homestead entries, Judge Sanborn stated in his opinion, in the case of *Germania Iron Company against James*, 89 Fed. 811, at p. 814, as follows:

"The rule and practice which the bill alleges that the Land Department has established was reasonable and just. It was that, after a decision of the Secretary had been rendered that a former entry was void and should be canceled, no subsequent entry of the land could be made until that decision was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records. The Secretary of the Interior is an appellate tribunal in these cases, whose court is held, and whose decisions are filed, more than 1,000 miles from most of the inferior tribunals in which the parties appear and institute and try their contests. It is according to the almost universal practice of judicial tribunals for the inferior court to take no action, and to allow none to be taken in it, until the decision and order of the ap-

pellate court has been officially received and recorded. The reasons for such a rule in the Land Department are far stronger and more imperative than in the ordinary courts of law or equity. It is in the local land office that the rights of the entrymen must be initiated as well as contested. The policy of the government is to afford to the actual settlers, to the preemptors and homesteaders, to those who live on or near the public land to be disposed of, every facility to acquire it without burdensome expense or unnecessary trouble. The very existence of the local land offices is the outgrowth of the purpose of congress to carry to the residents of the districts in which the lands are situated, not only the tribunals in which they may initiate and try their rights to obtain portions of the public domain, but all the information to enable them to intelligently prefer and establish their claims. To this end, the surveyor of each district is required to transmit to the registers and receivers of the local land offices general and particular plats of all lands surveyed in their respective districts, and these registers and receivers are required to keep a record of all entries and cancellations on these plats and in their books, so that any applicant for land may there learn when it is open for entry. To this end these plats and records in the local land office are declared to be open to public inspection, and the register and receiver are charged with the duty of giving correct information regarding them to every inquiring applicant. To this end, applicants to enter the public land may not make their entries or institute their proceedings to obtain them in the general land office of the district in which the lands are situated."

This opinion was rendered reversing a judgment sanctioning a demurrer. It was alleged in the complaint that it was the rule and practice of the Land Department that no entry could be made upon lands covered by a prior entry until such prior entry should have been canceled upon the books of the local land office. It was this allegation which

saved the complaint as against demurrer. The defendant in such case thereafter interposed an answer denying the allegation in the complaint that such a rule existed in the Land Office. Upon trial, judgment was rendered in favor of plaintiff. Upon appeal the judgment was affirmed. 107 Fed., p. 597.

At page 604, the court re-affirms the reasons stated in its opinion upon the demurrer.

Referring to the alleged rule of the Land Department that no interest could be acquired in land covered by a prior entry until such entry should have been, not only declared invalid, but marked canceled upon the books of the local land office, the court reviews with elaboration the decisions and rules of the Land Department and concludes that such rule did exist. The existence of such rule is the foundation of the various adjudications by the courts that land upon which an entry exists is segregated from the public domain until such entry shall have been marked canceled.

We respectfully insist that no such rule has ever existed in the Land Department with respect to mineral entries, and that there is not a single case in the decisions either of the Land Department or of any court, to the effect that a mineral entry segregates the land pending an adjudication as to its invalidity, except *Batterton vs. Douglas Mining Company (Utah)* 120, Pacific 827, decided at about the same time as the instant case was decided by the Supreme Court of New Mexico.

One seeking title to mineral land initiates his title by monumenting his claim upon the ground. If he prefer to comply with the conditions essential to a possessory title he need never make any application to the Land Office and need never pay the United States a dollar, even though the territory be of the utmost value. His notice of location is

recorded, not in the Land Office, but in the accordance with state or territorial laws, in the designated county office. Others desiring to acquire title to the same territory receive their notice to his claim to it, not from the records of the land office, but from the monuments upon the ground and from the records in the county offices. If he should in course of time decide to change his possessory title into a fee simple, he applies for a patent; if another party claims the territory, the Land Office is not the tribunal before which their conflicting claims are litigated, as would be the case with homestead entries; for, by provision of congress, the moment the adverse is filed, the questions in dispute are held in abeyance by the Interior Department until adjudicated by the local courts.

As has been heretofore stated, the burden of establishing that there is rule or law whereby a mineral entry has the peculiar effect, without respect to its own validity, of segregating the land from the public domain, is upon the appellant, and even if there were no direct authority against appellant's contention, we would insist in the absence of authority, and in view of the obvious distinction between mineral entries and non-mineral entries, and of the fact that a rule of the department does prevail with respect to non-mineral entries, that it had not assumed the burden.

We respectfully submit, however, that the distinction between mineral and non-mineral entries is recognized by the courts and that what decisions there are upon the question, are to the effect that a mineral entry does not segregate the land from the public domain.

BROWN vs. GURNEY, 201 U. S. 184, 50 L. Ed. 717.

The above case is cited in appellant's brief. To us, it establishes conclusively the distinction between the effect of mineral and of agricultural entries.

In *Brown vs. Gurney*, it appeared that the Kohnyo claim had been located. The Mt. Rosa placer claim, wedge-like, cut the Kohnyo claim about the middle. The owner of the Kohnyo claim applied for patent, and the department held that by reason of its north and south ends not being contiguous, the entire claim could not be patented. The chief values appeared to be upon the north end of the claim and the department's decision, apparently recognizing this fact, was that the claimant might elect whether to retain the north or the south end of the claim; and that if he should fail within sixty days to make any election, he should be deemed to have elected the north end.

The claimant at once instituted proceedings to contest the right of the owner of the Mt. Rosa claim to the strip of territory dividing the north from the south ends of the Kohnyo claim. Obviously his success in this contention would have made the Kohnyo claim continuous and he would have been able to patent the entire claim. After some two years this contest was decided against the claimant. The sixty days' time given to him to make his election between the north and south ends was held to have been suspended during his contest with respect to the Mt. Rosa territory.

The owner of the Kohnyo claim still had the right to elect to retain either end. His interest, therefore, prior to such election, was a vested contingent interest, in both ends. His interest in each end was contingent upon whether or not he should take it or the other end, but though contingent, it was, nevertheless, a vested interest; and therefore, it was this vested interest of the claimant of the Kohnyo claim and not his patent entry which segregated the entire claim from the public domain during the existence of such vested contingent interest.

In the meantime, and prior to the exercise of such election, one Brown located the south end of the Kohnyo claim. Then the owner of the Kohnyo exercised his election by filing it with the Commissioner of the Land Office at Washington. By such act, he abandoned his contingent interest to the south end, and his interest in the north end was changed from a contingent to an absolute interest. Upon the filing of such election, Gurney located the south end. Subsequently the Commissioner of the Land Office transmitted the election of the Kohnyo claimant to the local land office, which office thereupon canceled upon its books the claimant's original entry. Whereupon, one Small located the south end.

It was determined by this court that Gurney, who was the first person to locate the south end after the filing of the election, had a right prior to that of the other two parties, one of whom, as stated, had located prior to the election by the Kohnyo claimant, and the other subsequent to the cancellation of the entry upon the records of the land office.

It seems impossible to conceive a case which so comprehensively disposes of the issues involved in the proposition now under consideration.

Brown who located the south end prior to the election acquired no right, not as argued by counsel for appellant, because the entry of the Kohnyo claimant segregated the land from the public domain, but because, as has been stated, the Kohnyo claimant still had a contingent interest in both ends of such claim.

If the rule applicable to homestead entries had application to mineral entries, as argued by counsel for appellant, then Small, who did not locate until after the cancellation of the entry, would have had title to the premises, for it is

undisputed law, as evidenced by the opinions of Judge Sanborn, *supra*, that the right to acquire territory covered by a prior homestead entry only accrues after, not the adjudication declaring the prior entry invalid, but the cancellation of the same upon the books of the local land office. If the same rule, as argued by counsel for appellant, applied to mineral entries, then Gurney's location of territory prior to the cancellation of the entry upon the books of the local land office, would have been invalid; but the court held that it was valid, thereby conclusively defining the distinction for which we contend. In other words, the court in seeking a determination of the validity of the three locations, looked not at all at the entries upon the books of the Interior Department, but solely to the ascertainment of whether or not at the time Gurney located, anyone else had an interest in the territory. It found that when Brown located, the Kohno claimant still had his contingent interest, and it thereby passed Brown's location as invalid. Chronologically it came next to the election by the Kohno claimant. It did not stop to inquire as to whether the entry had been canceled on the books of the local land office, but passed on until it came to Gurney's location; and upon finding it to be the first location after the extinguishment of the Kohno claimant's contingent interest, pronounced it valid without respect to what the local land office had or had not done.

MURRAY vs. POLGLASE, 17 Mon. 455; 43 Pac., 505;

ADAMS vs. POLGLASE, 23 Mon. 401; 59 Pac., page 439.

The above decisions are conclusive against appellant's contention.

On September 17, 1892, Polglase and others made application for patent upon the Ramsdell mining claim. Mur-

ray and others filed an adverse and brought an adverse claim suit similar to the one at bar. The plaintiffs based their claim upon a prior location named "Maud S." It appeared that the assessment work upon the Maud S. had not been done for the years 1887 and 1888; that on December 29, 1887, plaintiffs made entry in the United States Land Office for such claim and obtained the receiver's receipt for it; that the Ramsdell location was made on January 1, 1888.

Upon the trial the plaintiffs introduced in evidence the location notice of the Maud S. claim and the receiver's receipt, and rested.

It appeared by the admissions of the pleadings that the plaintiffs had failed to do the assessment work for the years 1887 and 1888. The defendants offered the decision of the Register and Receiver of the United States Land Office canceling the Receiver's receipt and the decision of the Commissioner of the General Land Office and of the Secretary of the Interior affirming the decision of Register and Receiver. These documents were excluded by the court and judgment was entered upon an instructed verdict in favor of the plaintiffs. From this judgment the defendants appealed.

It appears that the Receiver's receipt given on the 27th of December, 1887, was outstanding, uncanceled, on the first of January, 1888, when the Ramsdell claim was located. If so, and such receipt had the effect claimed by counsel for plaintiffs in such case, of segregating the territory from the public domain, then the Ramsdell location was void, even as in this case appellant contends that appellee's locations of May, 1906, were void; and in such event the decisions subsequently rendered canceling such entry and receipt would have been immaterial, and the ruling of the court excluding them, and the consequent judgment have been proper.

The Supreme Court of Montana, however, reversed the judgment, saying:

"These documents were material to defendant's case. Plaintiffs had proved a receiver's receipt for the land in controversy. To avoid this result, it was material to defendants to show that this receiver's receipt did not exist, and that it, with its force and power, had been destroyed by the cancellation of the same by the officers of the land department having jurisdiction over that subject. For these reasons the judgment of the district court will be reversed and a new trial ordered."

Murray vs. Polglase, 17 Mont. 455, 43 Pac. 505, at page 508.

The inevitable conclusion from this judgment is that the validity of the Ramsdell location depended not upon whether the entry was uncanceled, and its validity undetermined at the time of such location, but upon whether such entry, though subsisting at the time of such location, was by subsequent decision ascertained to be valid or invalid.

Upon the new trial thus ordered, Adams and others intervened, claiming the ground in controversy as against both plaintiffs and defendants, under a location made by them on January 31, 1894, as the "Adverse lode mining claim." The interveners claimed that the plaintiffs had lost whatever right they had acquired under the Maud S. location by their failure to do the assessment work, and that the defendants' location was invalid because the receiver's receipt outstanding in the hands of the plaintiffs on January 1, 1888, the date of the defendants' location of the Ramsdell claim, had withdrawn the land from the public domain, and that it was not open to location by anyone at such time, and that, therefore, the defendants acquired no right to it by virtue of the Ramsdell location.

It is manifest that this is the precise contention of the appellants upon this appeal. The lower court ruled in effect that the location of the Ramsdell claim by defendants was for such reason invalid, and judgment was rendered in favor of the interveners.

The Supreme Court reversed the judgment, saying:

" * * the real question to be determined is, who is entitled to the patent from the United States government to the mining claim in controversy, or, in other words, who has become the purchaser of the mining claim, and divested the title of the government thereto, by complying with the requirements of the law of congress relative to acquiring title to mineral lands. * * (p. 441).

The cancellation of plaintiffs' receipt adjudicated the fact that they obtained no title at all by their entry. By this judgment of the authorities of the land office they were deprived of the ability to claim any rights under it. They were left with just such rights as they had at the time they obtained it. If they chose to rely upon it as evidence of their title, and then forebore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost nothing. They stand in the same position as they would have stood on January 1, 1888, if they had not obtained the receipt at all. They can not be heard to say that during the time the receipt was outstanding the land was withdrawn from the mass of public lands and that defendants acquired no rights under their location. Plaintiffs' rights were forfeited and the Maud S. claim was subject to relocation, at the time the Ramsdell claim was located." (p. 444.)

Murray vs. Polglase, 23 Mont. 401, 59 Pac. 439, at pp. 441-444.

The subject matter of this litigation was also twice before the Land Department.

On the 5th of March, 1904, in *Adams vs. Polglase*, 32 Land Decisions, p. 477, the Honorable Secretary Hitchcock, renders his opinion as follows:

"The Maud S. was canceled by the land department as the result of the proceedings had on the protest filed by the Ramsdell lode claimants, on the ground that an expenditure of the value of \$500 in labor or improvements had never been made upon or for the benefit of the Maud S. claim, as required by section 2325 of the Revised Statutes. Compliance with this requirement of the statute prior to the expiration of the period of publication is an indispensable prerequisite to entry and patent, and without such compliance there can be no valid entry. It may be conceded, however, that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled, the lands from such date became subject to location, and the prior location by the Ramsdell lode claimants became from such time effective, if rights thereunder were then being, and were thereafter asserted according to the mining law."

The Honorable Secretary cited in support of the quoted portion of his opinion the case of *Noonan vs. Caledonia Gold Mining Company*, 121 U. S. 393.

Adams moved for a rehearing, and urged in support of his motion that the last mentioned case as construed in the later case of *Kendall vs. San Juan Mining Company*, 144 U. S. 658, was not authority upon the point for which it was cited by the Secretary. The Secretary, however, denied the motion for review, declaring that there is a

" * * * long established ruling of the Department, in cases similar to the present one, to the effect that mining locations or entries under the public land laws, made upon lands not at the time regularly subject thereto, may nevertheless, if maintained in good faith, and the land subsequently becomes subject to such location or entry, be permitted to remain intact, as having

attached on such date, if at that time there be no adverse claim. (See Roy Roy Lode, 1 Brainard, 173; Dobbs Placer Mine, 1 L. D. 565, 568; Gunnison Crystal Mining Co., 2 L. D. 722, 724-5; Meyer et al vs. Hyman, 7 L. D. 336; Moss Rose Lode, 11 L. D., 120; Colomokas Gold Mining Co., 28 L. D. 172, 174.)

"There being no claim to the land here involved adverse to that of the Ramsdell lode claimants at the date of the cancellation of the Maud S. entry, the Department is of the opinion that the holding in the cases cited is clearly applicable in the present case."

The conclusion of the Secretary was undoubtedly correct, but we question whether the language employed by him was in harmony with the philosophy of mining law. We refer to that portion of the above quoted opinion in which he says:

"It should be conceded, however, that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled, the lands from such date became subject to location and the prior location by the Ramsdell lode claimants became from such time effective."

Such was the practical legal effect of the several transactions.

It would seem to us that the more appropriate expression would have been that, while the Maud S. entry stood uncanceled of record, it was unascertained whether the lands covered thereby were properly subject to location, and the question of whether or not they were at the time of the location subject to location would not be answered until the decision of the Land Office should be rendered; and, therefore, that when by the cancellation of the entry it was judicially ascertained that such entry was ineffective to establish an equitable title, then it became ascertained that the

lands had been open to location at the time of the location, and that the location had been always valid and effective.

We have here two express rulings by the Land Department, that a mineral entry does not segregate the land from the public domain, as does an entry upon agricultural land. As we have seen from the decision of Judge Sanborn in the *Germania* case, the doctrine of segregation by reason of an uncanceled entry even though invalid is based primarily upon a rule of the Land Department. It will not be claimed by counsel for appellant that there is a rule in express terms to the effect that a mineral entry though invalid, segregates the land until it be canceled or adjudged invalid. Certainly it can not be successfully argued that such a rule as to mineral entries should be inferred from the fact of there being such a rule as to agricultural entries, in the face of this holding by the Secretary, that there is a long established rule of the department to the contrary.

THE RULE THAT INVALID AGRICULTURAL ENTRIES SEGREGATE THE LAND UNTIL CANCELLATION IS NOT INCONSISTENT WITH THE PRINCIPLE THAT THE FACT OF SEGREGATION DEPENDS FUNDAMENTALLY UPON THE FACT OF AN INTEREST IN THE PROPERTY EXISTING IN A THIRD PARTY.

In addition to the distinctions heretofore alluded to between the respective procedures for the acquisition of mineral and agricultural lands, there is one to which attention has not yet been called.

By section 2, Chapter 89 (21 Stat. at Large, 141). U. S. Compiled Statutes, 1901, page 1392, it is provided:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption homestead, or timber cul-

ture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

The inevitable effect of this section is to segregate from the public domain lands covered by the homestead entry, however fraudulent or void it may be.

This court held in the case of *Hodges vs. Colcord*, 193 U. S., 192, 48 Lawyers' Ed. 677, that the right of entry given by this section inures to the benefit of a contestant who procures the cancellation of an entry even though the same be void. The logical effect, therefore, of this statute is that the very act of congress which constitutes the general grant to all entrymen, obligates the government immediately upon the filing of an entry, even though it be a void one, to withhold the land, not for the benefit of the entryman if his entry should be ascertained to have been invalid or fraudulent or void, but for the benefit of the person, if any, who apprises the government of the invalidity. It is a matter of public policy, and discourages fraud by offering reward to him who prevents it.

In other words, just as in the case of *Brown vs. Gurney*, the Kohnyo claimant had a contingent interest in both ends of the claim until by electing one end, he abandoned the other. So in the act of congress, the instant a homestead entry is in fact filed, a contingent beneficial interest is created in favor of a person as yet unascertained.

During the progress of the proceedings prior to the issue of the patent, anyone under the law may institute a contest, and such contestant forthwith is vested with an interest in the land, contingent upon the success of his contest and his filing upon the land himself within thirty days after the notice of cancellation. By reason of this statute the government has not the power to sell the land until

thirty days after the cancellation of the prior entry; and therefore, as a necessary corollary, no one has a right, prior to the expiration of such thirty days after cancellation, to initiate a right upon it, for the initiation of a right by an individual necessarily depends upon the right of the government to sell.

We therefore, conclude this branch of the subject by repeating that the only logical test, and the proper test of the right of anyone to enter land which belongs to the government and which by act of congress is thrown open to all of our citizens, is whether or not any other person has a valid prior interest, absolute or contingent, in the land. If no such interest in fact exists, then the land is open to location, the right depending upon the fact of whether such interest in a third party exists, and not upon whether such fact may or may not have been judicially ascertained at the time of location.

PATENT PROCEEDINGS ONLY DISPENSE WITH NECESSITY FOR ANNUAL LABOR IN THE EVENT THAT THEY RESULT IN PATENT.

We do not believe it necessary that appellee should establish that appellant's entry was void *ab initio*. If our reasoning be sound, then it suffices that such entry was voidable, if as a matter of fact it was ascertained by subsequent adjudication to be invalid. Courts do not make law, they determine it. They declare legal relations as they existed at the time of the happening of the transactions, to which the law is subsequently applied. When the appellee made his five locations, it was not ascertained whether they were valid or not. Their validity was dependent upon whether or not appellant's application should be sustained. If it should be sustained, appellant then, by virtue of such application, was relieved from its duty to do assessment

work. If not sustained, then its interest in the premises lapsed by reason of its failure to do assessment work prior to appellee's location of the five claims. As stated by the Court in the Polglase case above quoted

"If they chose to rely upon it (the receiver's receipt) as evidence of their title, and then forebore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost anything."

This question is so philosophically treated by Costigan in his work on mining law, that we quote from Section 85, page 286 of that book, as follows:

"After a patent actually issues no work need be done, of course; but will anything short of patent excuse? It seems perfectly clear that after entry in the land office—that is, after the patent proceedings have passed the point where the contract of purchase is complete by the payment of the money for the land by the applicant—the applicant need perform no more actual labor if patent ultimately issues to him, or, more accurately, if the entry is not canceled by the land department. The reason is that in such case all proceedings in the land department after entry are immaterial, and the receiver's receipt makes the applicant the equitable, and for all practical purpose the actual, patentee. But the "if" above noted causes the trouble. *If for any reason* the receiver's receipt is canceled by the land department the applicant finds himself governed by the general rule that until entry the annual labor must be kept up, and may therefore find himself without a claim because some third person relocates it on account of the failure to keep up the annual labor."

* * The only wise course is to perform the annual labor, not only until the receiver's receipt is issued, but also, for fear of protest on the ground of laches or fraud, to perform that labor until patent actually issues."

V.

THE ENTRY OF APPELLANT WAS VOID
AB INITIO.

The Secretary of the Interior had jurisdiction over appellant's application for a patent. The Land Department was a tribunal with jurisdiction over the parties and the subject matter, and its judgment cannot be collaterally attacked. The Land Department held that as between the United States and the appellant, the appellant's application was void *ab initio* and a nullity.

In this adjudication the appellant acquiesced, and he cannot attack it collaterally or at all.

U. S. vs. Winona & St. P. R. R. Co., 67 Fed., 955;
New Dunderburg Mining Co. vs. Old, 79 Fed., 602;
U. S. vs. Northern Pac. R. R. Co., 95 Fed., 869;
King vs. McAndrews, 111 Fed. 864;
Knight vs. U. S. Land Ass'n, 142 U. S., 211.

We do not believe that it makes any difference whether the Secretary was right or wrong in his adjudication that the application for a patent and the final receipt were jurisdictionally defective. It suffices that the court decided that it was jurisdictionally defective in a proceeding in which both the United States and the appellant were proper parties.

In *United States against Winona & St. P. R. R. Co.*, supra, certain lands had been erroneously granted to the State for the benefit of the railroad company.

It was held that the decision of the land department was not subject to collateral attack. After a general statement the court proceeds:

"These authorities and those above cited which we have not reviewed, perhaps sufficiently illustrate the distinction between the cases in which the land department has acted upon a subject-matter within and one

without its jurisdiction. A careful study and analysis of these decisions will show that none of them are inconsistent with the following rules:

(1) A patent or certificate of the land department to land over which that department has no power of disposition and no jurisdiction to determine the claims of applicants for, under the acts of congress, is absolutely void, and conveys no title whatever. Land the title to which had passed from the government to another party before the claim on which the patent is based was initiated, land reserved from sale and disposition for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice and land for the disposition of which the acts of congress have made no provision, is of this character. *Polk vs. Wendal*, 9 Cranch, 87, and cases cited under it *supra*. (2). A patent or certificate of the land department to land over which that department has the power of disposition and the jurisdiction to determine the claim of applicants for, under the acts of congress, is impregnable to collateral attack whether the decision of the department is right or wrong, and it conveys the legal title to the patentee or to the party named as entitled to that title in the patent or certificate. *Minter vs. Crommelin*, 18 How., 87, 89 and cases cited under its *supra*. (3). A court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it in cases in which the action of the land department has resulted from fraud, mistake or erroneous views of the law."

The effect of this decision is to hold that a ruling of the land department that certain lands had not been so withdrawn from the public domain as to prevent their being certified to a railroad company entitled to a grant in aid of its construction, though such ruling were erroneous as a matter of law, was nevertheless not subject to collateral

attack. In other words, the land department ruled that by certain entries which were subsequently canceled, the lands were not so withdrawn from the public domain as to prevent the land grant from attaching upon cancellation. This ruling was undoubtedly erroneous but within the jurisdiction of the land department to make. That is, the land department had assumed jurisdiction and held in fact that it did have jurisdiction to grant the land to the State of Minnesota in aid of the railroad company; and this ruling in that regard though erroneous, was not void. Per contra it would seem that in a case where entry was attempted and the land department held that it did not acquire jurisdiction, and that the entry was void, the ruling whether erroneous or not would be equally impervious to collateral attack. Where the land department is lacking in jurisdiction over the land itself, its action in attempting to issue a patent is an absolute nullity and may be reviewed and annulled by the courts upon collateral attack. But where the jurisdiction exists over the land itself, and the question is whether the land department by the particular proceedings under consideration acquired jurisdiction to act, then the question of jurisdiction is a matter to be determined by the Land Department itself. If it holds that it has jurisdiction and does act, its ruling though erroneous, is binding upon everyone but the government, likewise when it considers the matter and determines that it never acquired jurisdiction, this rule is equally binding and amounts by deduction to a holding that in effect no entry was ever made; and hence, of course, that no withdrawal from the public domain was accomplished by the attempted entry. It is only upon the supposition that the applicant for patent has done all in his power to secure it, and that the issue of the patent is a mere ministerial act, that the final receipt is given practically the same effect as the patent itself. This

view is based upon the supposition that the proceedings are regular, or at least not wanting in jurisdiction, and that the patent will issue in due course of procedure, and that the consequences of the delay incident to the transaction of business by the land department, and the subsequent lapse of time between the making of the final entry and the issuance of patent are not to prejudice the applicant who has complied with the statutory requirements. Likewise where the entry is canceled for some act or neglect occurring after the making of the entry the same rule would apply, for the entry being apparently valid, and within the power of the land department to allow, the land must necessarily be withdrawn from the public domain so long as the entry remains uncanceled: but in a case where the proceedings were so defective and so far departed from the requirements of the statute that the Land Department never in fact acquired jurisdiction to proceed at all and the land department itself so holds, in the very same proceeding, it would seem that such ruling of the department is an adjudication that it did not and never had jurisdiction, and that the whole proceeding was a nullity, and, like any void judgment was of no more effect than if it had never existed.

We believe, however, that the decision of the Secretary was good law.

It is, of course, recognized law that if service of process is actually made, defective proof of service will not render a judgment invalid, and it may be cured by the substitution of proper proof. The reason is that it is the service of the process which confers jurisdiction, and not the proof of such service.

Section 2325 of the Revised Statutes provides that an applicant for a patent shall post a copy of his plat, to-

gether with a notice of his application for patent in a conspicuous place on the land previous to the filing of his application for a patent, and "shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall *thereupon* be entitled to a patent for the land *in the manner following*: the register of the land office upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claims, and he shall also post such notice in his office for the same period.

Section 2335 provides that all affidavits required to be made under this chapter should be verified before an officer authorized to administer oaths within the land district where the claims may be situated.

Counsel for appellant argue with great earnestness that the *fact* of posting gave the local land office jurisdiction to issue the receipt.

At page 79, it is said:

"The commissioner and the secretary confuse the *fact* of posting with the *proof* of such posting. The former is jurisdictional; the latter is not. *Without* such previous posting the application can not be carried forward to publication and entry; but if the affidavit of posting be *lost* the *fact* of such posting having actually occurred, and standing undisputed, there is no law or rule of practice known to any court which declares the jurisdiction defeated in the presence of the *fact* simply through error or misplacement in the *proof* of the fact."

We submit that the confusion is in counsel's treatment of the subject, and not with the commissioner and the secretary. The entire argument upon the subject goes

to the *wisdom* of the statute, and while pertinent if addressed to a legislative committee, is, it seems to us, without force as bearing upon the present issue.

Congress specifically prescribes not that the applicant shall be entitled to a patent upon complying with the other provisions of the statute and posting a copy of the plat and notice of the application, but upon doing such things and filing with the register of the Land Office an affidavit that the notice has been duly posted. The register of the Land Office has no authority to accept the application or the plat or the field notes or the notices unless they are accompanied with the affidavit prescribed by the statute.

The filing of the affidavit is a condition precedent to his jurisdiction to act at all, and is also a condition precedent to the applicant becoming entitled to a patent.

The posting of the notice is not the process or the service of process in the proceeding. The application is the complaint. The publication of the notice by the register of the Land Office in the newspaper and the posting of such notice by the register in his office for sixty days constitute the service of the process. The original posting of the notice is one of the steps which are necessary to authorize the register of the Land Office to issue and serve the process, to-wit: to do the publishing and the posting in his office. The filing of the affidavit is another step, and is also essential to the authority of the register to issue and serve the process. Congress has enacted that both of these steps shall be taken before the register of the Land Office is vested with the jurisdiction to issue and serve process, and, to continue the analogy of the proceeding to that of ordinary litigation, the defendants, for whom the United States is in a measure trustee, are all persons known or unknown who have or claim an interest in the property.

The proceeding is similar to an action to quiet title against unknown owners or claimants who are to be served with process by publication, the material difference being that any person may without leave, file his action to quiet title and serve his process, while in this proceeding an applicant is not permitted by law to serve the process, but the statute provides that such process shall be issued and served by the register of the Land Office, but the authority of the register to issue and serve, the process is not conferred until complete compliance by the applicant with certain statutory requirements. No process, therefore, was ever properly issued or properly served. The proceeding lacked jurisdiction from the outset, and was at all times a nullity.

Even if the amended affidavit had any effect whatever, which we think it did not have, it could not have a retroactive effect as against the intervening rights of third parties. Such amended affidavit was not filed until 1907 (Record page 149), and the appellee's amended locations and locations of the Aurora, Tip Top and Lynch were made in December, 1906. Therefore, at the time the appellee made such locations there was certainly no valid application for a patent. We are convinced, however, that the amended affidavit could not have a retroactive effect for any purpose, and the proceedings were at all times a nullity.

A correct illustration will be found in the statutes of some States with respect to the service of process by publication. In the State of New York, for instance, service by publication can only be made upon order of the court, and it is provided by statute that it must appear to the court by affidavit, that the defendant "is a non-resident, and after due diligence cannot be served within the State."

In the case of *McCracken vs. Flanagan*, 127 N. Y., 493, 28 N. E. 385, an affidavit was presented to a judge stating that the defendant "is a non-resident and can not be found within the State." Upon such affidavit the court granted an order of publication, and the summons was served, judgment entered by default, and real estate sold under execution.

The successors in the interest of the judgment debtor brought an action of ejectment against the purchaser under the judgment sale, thus attacking the judgment collaterally, basing his attack solely upon the ground that the affidavit upon which the order for publication was granted did not show that the defendant could not be found "after due diligence" and that the judgment was void. It was in the record that the judge granting the order had passed finally upon the sufficiency of the affidavit; but the New York Court of Appeals decided in favor of the plaintiff, that the defective affidavit was jurisdictional, and that the order of publication was void, and the judgment subject to collateral attack.

The affidavit executed in this case before a notary public in Texas was no affidavit at all. If false it could not have been made the basis for an indictment for perjury. It may be true that the posting was actually done, as in the *McCracken* case it might also have been true that the defendant could not, after due diligence, have been found within the State of New York. The fact remains that the legislative power in both cases made the affidavits conditions precedent to the institution of the proceedings, and therefore such proceedings without such affidavits were void ab initio and a nullity.

Counsel for appellant undertake to argue that the Secretary erred in rejecting appellant's application, and

canceling the entry. As has been heretofore suggested, appellant is concluded by the decision of the Secretary from questioning in this action the results of such adjudication.

The appellant did not do his assessment work in the years 1904 and 1905 when appellee located the five claims, and this fact, unexplained, establishes the validity of appellee's locations. To excuse such lack of assessment work, appellee offers his application for patent and the final receipt. If such application had proceeded to patent, appellant would have been relieved from non-performance of assessment work. But it did not go to patent. It was at its own peril that appellant omitted to do its assessment work. It took its chances, and, as stated, in the opinion in *Murray vs. Polglase*, *supra*, it can only blame itself for the position in which it now stands. If this court should, as requested by counsel for appellant, collaterally review the judgment of the Interior Department, and upon such review arrive at determination that the department erred in its conclusion, even then this court will be unable to give to appellant any relief.

It appears by the findings that the Commissioner of the Land Office on the 10th of April, 1906, found the entry to be defective for a number of reasons in addition to the reason that the affidavits were not executed within the land district. It was found defective because the Hortense claim contained an excess in area; because the requisite lines were not shown; because the mineral character of the land did not satisfactorily appear; and because the Aluminum and Hortense claims were irregular in shape, and no sufficient reason had been shown for the failure to conform them as near as practicable with the United States system of public land surveys. (R. p. 146.)

No evidence was introduced by the appellant with respect to any of these matters, and it must be presumed that the decision of the Commissioner was as to these other matters correct and that his order rejecting the application would have been affirmed, even if the Secretary had determined that the affidavit was capable of being cured. This first decision of the Commissioner of the Land Office was rendered on the 10th of April, 1906. The appellant made no effort to relocate or to resume its assessment work. Appellee relocated in May, 1906, and the supplemental affidavits were not filed until still later. There are neither allegations nor evidence sufficient to warrant this court in finding, even if it were competent for it to do so, that the judgment of the Land Office was erroneous, and should be set aside in this collateral proceeding.

This position is reinforced by the fact that appellant did not exhaust its remedy before the Land Court by moving for a review. On the contrary, it voluntarily appeared before its time to review had expired and waived its right to do so. It virtually withdrew its application for a patent.

The position of the appellant is analogous to that of one who, in answering a complaint, pleads the judgment of a court of first instance in bar.

Plaintiff, in reply, pleads a judgment of a higher court, reversing the judgment of the lower court.

It is a general law, except where otherwise prescribed by statute, that a judgment is evidence until reversed.

It is certainly inconceivable that the defendant in such supposititious case could claim any effect for a judgment, which under a supplemental pleading the plaintiff showed had been reversed. The final receipt may be considered at most as a judgment entered by a court of original juris-

diction. Until reversed it stood as a *prima facie* excuse for the non-performance by appellant of its assessment work. When reversed by the higher court it became ineffective for any purpose whatever, and, as has been stated, without respect to whether such judgment were with or without jurisdiction, were erroneous or in accordance with the law. The fact remains that the application for a patent has been forever disposed of, and that the appellant stands here without having performed its assessment work, and with no legal reason for its failure to perform it.

CASES CITED BY APPELLANT.

Hastings &c. R. R. Co. vs. Whitney, 152 U. S., 363;
Whitney vs. Taylor, 158 U. S., 85.

These decisions are based upon the construction of the act of congress constituting a grant to railroad companies. Such act grants to the railroad certain designated lands other than those which are expressly excepted or reserved.

To quote the language of the court on this subject, in *Murray vs. Polglase*, *supra*:

"These exceptions are specifically mentioned, including among others enumerated, those to which 'the right of pre-emption or homestead settlement has attached' or those not 'free from exemption or other claims or rights,' and are held to be excluded from the portion of the grant by the very fact of their existence at the time the grant attaches, without regard to whether they are fraudulent or otherwise."

Noonan vs. Caledonia Mining Co., 121 U. S. 393;

Kendall vs. San Juan Silver Mining Co., 144 U. S. 658.

The former case is construed and explained in the latter and more recent one.

The law in the Kendall case not only does not conflict with the position assumed by appellee, but reinforces it.

By the terms of the treaty between the Indians and the United States government, the mining property in question was set apart for the absolute and undisputed use and occupation of the Indians therein named, and the United States agreed that no persons except those designated and certain officers, agents and employes of the government should ever be permitted to "pass over, settle upon or reside in the territory described."

The location of the Bear lode was made whilst this treaty was in force. The court very properly held that such location was invalid. It was invalid because the ground acquired by a locator is in the nature of a purchase from the United States government, and in that case the United States government had no right to the possession of the land, and therefore could not grant to anyone a possessory title to it.

The location of the Bear lode was invalid because at the time of such location other persons than the United States had an absolute interest in it. Such persons were the Indians protected by the treaty.

As we have repeatedly stated the test of the validity of a location is whether at the time it was made any one other than the locator and the United States government had any interest in the land.

The cases of *Teller vs. United States*, *Nielsen vs. Champagne M. & M. Co.*, *Aurora Hill, etc. Co. vs. 85 Mining Co.*, and *Benson Mining Company vs. Alta Mining Company*, discussed at pages 55 and 56 of appellant's brief, do not sustain its contention.

The doctrine that the applicant is vested with an equitable title to the land after the payment of the purchase price is based upon the fundamental fact that as a matter of law he is *then entitled* to the patent.

As is said in the *Benson Mining Company* case,

"with one voice they (the courts) affirm that when the *right to a patent exists*, the full equitable title has passed to the purchaser." (*Italics ours.*)

The very language of the statute prescribes when and how the applicant shall become entitled to a patent. Our contention is based upon the proposition that an applicant cannot be entitled to a patent until in addition to the doing of other things required by law, he has filed a proper affidavit with the Register of the Land Office in pursuance of which the Register does the things which consummate in the vesting of the equitable title in the applicant. To cite, therefore, in support of their proposition decisions that the applicant is vested with a full equitable title when his right to a patent exists is to beg the main question, to-wit, that the right to the patent exists.

Southern Cross Mining Company vs. Sexton is not an authority for appellant's contention. In that case the applicant had posted the proper notices and filed the proper papers and proofs with the Register of the Land Office. Having so done, under the language of the statute, he became thereupon entitled to the patent without the obligation upon him to do anything other than pay the purchase price at the proper time, and this he likewise did. He therefore was vested with an equitable title to the property, from which neither the land office nor congress had authority to divest him. His legal title had the patent been issued to him would perhaps have been defective by reason of the omissions of the Register of the Land Office, but this equit-

able title was at no time in doubt, and, therefore, when the Honorable Secretary before patent undertook to require the correction of the department's error in order that there might be no defect in the legal title the Supreme Court of California properly held that the applicant did not thereby lose his rights in the property, and this without respect to any decision which the Secretary might have made.

The decision was based in terms upon the opinion in *Lytle vs. Arkansas*, 9 How., 314, in which this court said

"that where an individual in the prosecution of a right does everything which the law requires of him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

In *Aurora Hill Consolidated Mining Company against 85 Mining Company*, 34 Fed., 515, the proceedings in the local land office were regular in all respects. The Commissioner of the General Land Office two years after the papers had been forwarded from the local land office notified the Register and Receiver that he required further proof of the posting of the notice of the claim *during the sixty-day period of publication*.

It thus appears that the additional proof required was of facts subsequent to the time when the applicant became entitled in pursuance of the statute to a patent by filing the required papers in the local land office. Being thus entitled to a patent, and having paid his purchase price, he was vested with the equitable ownership and it followed, as a matter of course, as stated in the portion of the opinion quoted in appellant's brief, that the defendants were mere trespassers and intruders.

Nielsen vs. Champagne M. & M. Co., 111 Fed., 655, was a bill in equity to enforce the conveyance to the plaintiff by the defendant of certain mining claims.

It was alleged in the bill that the defendant had made an application for a patent and had not expended the Five Hundred Dollars required by law upon the claims, and had not done the annual assessment work, and was not therefore entitled to the patent. That the plaintiff had entered upon the claims and re-located them; that the plaintiff had filed a protest in the Land Office against the issuance of any patent to the defendant, which protest had been overruled by the Commissioner of the General Land Office, whose decision upon appeal had been affirmed by the Secretary of the Interior.

The theory of the bill was that the decision of the Commissioner and of the Secretary were errors of law which might be reviewed in the courts, and it was prayed that the defendant should transfer the title to the plaintiff.

We regard this case as an authority for our contention.

In that case the Secretary of the Interior had decided in favor of the applicant, and the court refused to consider the plaintiff's bill, holding that his proper remedy was to induce the government to proceed to set aside the entry. Necessarily, the court held that plaintiff's location was invalid for the reason that it was bound by the decision of the Secretary to the effect that the defendant was vested with an equitable title to the premises at the time of plaintiff's location.

THE DECISION OF THE SECRETARY CANCEL- LING THE ENTRY IS BINDING AND CANNOT BE ATTACKED IN THIS PROCEEDING.

Counsel for appellant admit this proposition of law as laid down in the opinion of the territorial supreme court, and in the case of *Smelting Company vs. Kemp*, 104 U. S.,

636, and Knight vs. United States Land Association, 142 U. S., 161; but endeavor to attack their force by the suggestions.

First, That the Secretary's decision amounted to a mere construction of the law, and therefore is not binding; and

Second, That to attack the Land Department's action in this case is not a collateral attack upon it.

We submit that both of such grounds are faulty.

As has been heretofore stated, the Commissioner of the Land Office by its decision in April 10, 1906 (R. pp. 145-6), found the entry to be defective in a number of particulars. The appellant was given an opportunity to show cause why the entry should not in pursuance of such decision be canceled, and it has never done so and such original decision has become unappealable and is now binding.

Even if such had not been the case and the entry had been objected to on the sole ground of the insufficiency of the affidavit, even then the canceled entry would be res adjudicata. The court finds in pursuance of the stipulation of the parties (R. p. -9) that on the 24th of November, 1908, "the appellant waived before the Honorable Secretary its right to make a review of such decision, and thereupon such decision and the cancellation of said entry became final and such entry was canceled on the records of the land office" (R. 149).

The decision was rendered by the Secretary on the 9th of September, 1908; appellant's relocations were made on the 11th day of September, 1908 (R. 152), and on the 25th of November, 1908, the appellant filed in the local land office its application for the patent which is being adversed in this action. (Finding XIII, R. p. 152.)

It appears therefore that the appellant did not merely fail to move for a rehearing and thus exhaust its remedy before the Secretary of the Interior.

On the contrary, two days after it was filed, aware of the many imperfections in its prior locations and of the decision of the Commissioner of the Land Office in 1906 holding them to be defective in many ways, it determined to accept the Secretary's decision and to re-locate the ground, and did so as appears within such two days. Then before its time to move for a rehearing had expired, and with the evident purpose that the new locations upon which they intended to rely should not be imperiled by the pendency of its application for a patent and entry, and intending to apply at once for a patent under its new locations, it appeared before the Secretary, and by formal act accepted the Secretary's decision as final, and waived its right to review.

It thus foreclosed itself forever from asserting that such decision was erroneous or from asserting any right, whatever under such application for patent and such canceled entry; and on the following day it made the application for patent which is being adversed in this action.

As far as the appellant is concerned its own deliberate action made such canceled entry and the application which preceded it as if they had never been save and except as to the legal effect which any canceled and defective entry might have upon locations such as appellees which were made prior to its cancellation.

THE ACTION OF THE LAND DEPARTMENT CANNOT BE REVIEWED IN THIS ACTION.

Assuming, however, arguendo that the decision of the Secretary was erroneous and is not *res adjudicata* and was

not waived by the appellant, nevertheless, we submit that it cannot be reviewed in this action.

As said in *Aurora Hill Consolidated Mining Co. against 85 Mining Company*, *supra*, the officials of the Land Department

"like other officers err in regard to matters of law and the correct interpretation thereof. In such cases upon proper proceedings had for that purpose their judgments or decisions may be reviewed by the courts and corrected if erroneous. This can only be done by a direct proceeding for that purpose upon proper allegations disclosing fraud, mistake or other matters complained of."

Counsel argue, however, that to review the legality of the cancellation of appellant's entry is not a collateral attack upon the Land Department's action, and cite two cases, neither of which in our opinion supports the proposition.

Rebecca Gold Mining Company vs. Bryant, 71 p. 1110, 31 Colo. 119, which is counsel's main contention, presents an entirely different set of facts.

The Honorable Secretary simply made a mistake. The owners of the Rebecca claim were entitled to a patent upon the land in conflict when the land officer gave them the Receiver's receipt which correctly described it. The Commissioner of the Land Office, misled by a prior mistake in the description, the fact of whose correction had escaped him by inadvertence, of his own motion changed the description and excluded from the patent the territory in dispute.

His action was not judicial. There was no conflict or contest, and he gave no notice to the applicant of his action and the applicant received the patent in ignorance of the mistake which the Land Department had made.

The court held that the action of the Commissioner was void, not voidable, not due to erroneous construction of law, but absolutely void, and it appeared that the Commissioner of the Land Office had himself subsequently ruled that such action was "wholly unauthorized and void." It seems unnecessary to further urge this manifest distinction.

The other case cited by counsel, *Southern Cross Co. vs. Sexton*, has been heretofore discussed.

The decision was based as we have seen upon the fact that the ministerial mistake of the officers of the Land Department could not be effective to deprive an applicant of the right to a patent to which he had become entitled by a complete performance of all the requirements imposed upon him by the statute. While he held his final receipt and while his entry remained uncanceled although defective, the defendants applied to the United States Land Office for a patent. The plaintiff, who was the applicant and the owner of the equitable title, filed its protest and adverse claim to the issuance of the patent and regularly commenced the suit.

The complaint was filed on the 22d day of December, 1900. In November, 1901, a year after the suit has been commenced, the defendants moved the department asking that plaintiff's final receipt be canceled, and on April 22, 1902, the Secretary of the Interior canceled it and declared that it must be treated as canceled of date July 23d, 1895. This action of the Secretary was taken without a hearing given to the applicant.

The decision of the Supreme Court of California is that the Secretary "in promulgating the order for retroactive cancellation of the certificate without notice to the bona fide owners thereof, under the circumstances pre-

sented without controversy, in this case acted arbitrarily and in excess of his powers, and as a matter of equity his ruling cannot be given judicial effect."

The court quotes from the opinion of this court in *Parsons vs. Venzke*, 184 U. S. 89, in which this court determines that the jurisdiction of the Land Department is not an arbitrary one, "to be exercised *without notice to the parties interested*." (The italics are ours.)

This decision therefore is in effect that the action of the Secretary was void, and the Supreme Court of California assumed to review it upon such ground, and not upon the ground that it was merely erroneous.

Moreover, perhaps the court might find a ground for reviewing collaterally a decision of the Land Department for an error of law where such decision was rendered in a proceeding before the Land Department which was commenced after the action in which the court assumes to so review it.

Our analysis of this action would lead us to a conclusion with respect to it somewhat different from that which is expressed in the opinion of the Supreme Court of California.

We question whether the retroactive provision in the decision of the Secretary had any effect whatever. It does not seem to us that either the word "retroactive" or the words "not retroactive" are properly applicable to a decision as to the validity or invalidity of a final receipt. A decision that the final receipt and entry were invalid would, in our opinion, necessarily mean that it always had been invalid, and that therefore that portion of the Secretary's opinion declaring it to be retroactive was meaningless and superfluous.

In our view the judgment of the Supreme Court of California was correct upon the ground as heretofore stated, that the original applicant having done all that was required of him to be done, became vested with an equitable title, or, in other words, with a right to a valid final receipt, of which he could not be deprived.

In concluding this entire subject, we again invite the court's attention to the language of section 2325 of the Revised Statutes which appears at page 147 of the record, and which provides that upon doing certain things including the posting and the filing of the application for a patent and other papers and proofs in the Land Office, that the applicant "*shall thereupon be entitled to a patent for the land.*"

The grantor of the Southern Cross Gold Mining Company had done these things and therefore had become entitled upon paying the purchase price to a valid final receipt. He paid the purchase price and procured what the Honorable Secretary determined to be an invalid receipt. Conceding therefore that the final receipt was and always had been invalid, nevertheless for the reasons given in the opinion and stated by this court in *Lytle vs. Arkansas*, supra, the applicant was still entitled to a patent. Such determination, however, was not inconsistent with nor did it even tend to impair his right to a valid final receipt and to a consequent patent.

The principle of the decisions which hold that one who has a final receipt need not do his annual assessment work would apply equally to one who had done all things required of him by law to entitle him to a final receipt.

Therefore, without respect to the decision of the Secretary canceling the invalid final receipt or its retro-

active effect, the applicant fully recognizing the decision and its justice (assuming that it had been rendered upon notice to him, which it was not) would have still been entitled to the possession of the premises by reason of his having complied with the statute. Therefore, the Supreme Court of California properly rendered judgment in favor of the Southern Cross Gold Mining Company, although in our opinion, some of its reasoning was not in entire harmony with the underlying principles of mining law.

VI.

THE TERRITORY EMBRACED WITHIN APPELLEE'S CLAIMS WAS A PART OF THE PUBLIC DOMAIN.

As a final point, the appellant urges that there was no proof that at the time of the appellee's locations, the ground embraced within them was unoccupied public land, subject to location, and hence that the locations were invalid.

It is in effect admitted by the pleadings that the land embraced within appellee's locations was a part of the public domain except insofar as appellant's locations segregated it therefrom.

It is alleged in paragraph III of the complaint:

"That the plaintiff on the 12th day of September, A. D. 1908, by reason of discoveries theretofore by him made within the premises hereinafter described of valuable mineral deposits upon unappropriated mineral lands of the United States subject to location and purchase and divers locations thereof made and maintained by him and his grantors under and by virtue of a full compliance with the laws of the United States and of the Territory of New Mexico and within the local rules and customs of miners applicable to the locations upon the public domain of the United States of Placer Mining Claims, and was and still is entitled to the possession of the following described premises.

and tracts of land situated all in Section 9 of Tp. 29 South of Range 4 East, and in the County of Dona Ana and Territory of New Mexico, to-wit:" &c.

The complaint consists of seven paragraphs separately numbered, the last of which consists of two subdivisions. Such second subdivision is unnumbered.

The first seven paragraphs of the answer consist of admissions or denials of the correspondingly numbered paragraphs of the complaint, and the eighth paragraph of the answer, answers the unnumbered subdivision of paragraph VII of the complaint. Paragraph III of the answer is in response to the above quoted paragraph III of the complaint and is as follows:

"It (defendant) denies that the plaintiff on the 12th day of September, A. D., 1908; or at any other time, was or now is entitled to the possession of the property described in paragraph three of the plaintiff's complaint or any portion thereof, and denies that the plaintiff or any grantors of the plaintiff ever made any valid locations of the property therein described, or even complied with the laws of the United States or the laws of the Territory of New Mexico, or that any rules and customs applicable to the location upon the public domain of the United States of the mining claims, lands and premises in said paragraph of said complaint described as by the said plaintiff in said paragraph alleged."

This paragraph is an admission that the land embraced in appellee's locations was part of the public domain.

The ninth paragraph of defendant's answer is as follows:

"This defendant denies each and every allegation contained in said complaint not herein expressly by this defendant admitted to be true, and denies that the plaintiff is entitled to the relief or any part thereof by it prayed for, or to any relief whatsoever."

In the tenth and last paragraph of the answer, the defendant alleges that "on the 12th day of September, 1908, and for several years prior thereto before the assertion by plaintiff of any right or claim to any portion thereof," the land in question "was embraced within valid mining locations," copies of which were annexed to the answer, and which were the locations of the Hortense and Aluminum claims.

The case was tried upon the theory that the appellant's locations were prior to those of anyone else, and that the appellee's locations were valid if they conform to the law and if appellant's locations had become forfeited as contended for by appellee.

The defendant made no motion for a non-suit either at the close of plaintiff's case or at the close of the testimony, and the matter on the 13th of December, 1909 (R. p. 71), was argued and submitted to the court for its decision. It was not until more than a year after, December 17th, 1910 (R. p. 67), when the court rendered judgment in favor of the plaintiff, that the defendant even inferentially called attention to the point now raised.

It is submitted, that in view of the categorical pleading to each of the allegations of the complaint, the general denial of paragraph IX should not be construed as raising the issue which is the basis of appellant's present contention.

In many jurisdictions a general denial, such as that contained in paragraph IX of the answer, is held to be ineffective.

I Ency. Pl. and Pr., 802, and
Cases cited.

"The court in construing it (such a general denial) will resolve all doubts against it and hold that

it admits allegations unless it positively indicates a purpose to make the question it purports to be in issue, one of the contested issues on the trial."

1 Ency. Pl. and Pr., p. 804.

and cases cited in Note 1.

"A general denial in an answer of all allegations not expressly admitted or qualified is inapplicable to a subject as to which specific answer is made."

Davenport vs. Ladd, 38 Minn., 545; 38 N. W. 622;

The case of Althouse vs. Town of Jamestown, 91 Wis., 46; 64 N. W., 423, seems to be precisely in point.

The Wisconsin statute is substantially the same as that of New Mexico. In that State the defendant is required by answer in order to create an issue, to interpose "a general or specific denial of each material allegation of the complaint controverted by it, or of any knowledge or information thereof sufficient to form a belief."

In its opinion the Court said:

"The answer then proceeds to admit various portions of the complaint, making affirmative allegations in respect to the matters therein referred to; and this is followed by specific denials of various portions, when the portion in relation to giving notice of injury, already quoted appears. The portion of the answer relating specifically to the question of notice is so clearly insufficient as to operate as an admission of the allegations of the complaint on that subject, and the general denial, it would seem, should be restricted in its operation and effect to matters not specifically treated in the answer. It is doubtful if the pleader has any right, after having gone over the complaint in detail—whether by sufficient denials or not—to expect a denial such as the answer opens with in this case will serve to take away from the remainder of the answer its defective character. Such denial ought rather to be restrained to matter not expressly re-

ferred to, or attempted to be covered, by the specific allegations of the answer. It is neither a general nor a specific denial, within the meaning of the statute."

The rule is based on fairness and equity. It is not the purpose of the law to trap either party to a litigation. When an answer as in this case, treats in separate paragraphs each separate paragraph of the complaint, and answers and denies with respect to them, it is reasonable that both court and counsel for plaintiff should conclude that there is no necessity to prove matters which in such categorical denials remain undenied.

A fair and equitable construction of the pleadings, especially in view of the conduct of all parties at the trial, justified the court in concluding that the plaintiff had made out its affirmative case.

It seems to us that this case by reason of the theory upon which it was tried is squarely within the decision in *Brown vs. Gurney*, *supra*, where the same sort of tacit assumption existed, and where it was held that the question could not afterward be raised.

This case differs widely from the cases cited by counsel for the appellant. In each of them the point was distinctly urged at the trial by motion for non-suit and an opportunity given to furnish the required proof.

Moreover, an examination of the cases cited, shows that the language used was with reference to a situation of an altogether different character. In each of such cases the existence of a prior location was proved and the Court held that its continuance in the absence of proof by plaintiff would be presumed. Thus, in *Lozar vs. Neill*, 37 Mont. 287, 96 Pac. 343, the defendant's claim, the Violet Jane, was located January 1st, 1898; the plaintiff's claim, the Sunrise, was located in June, 1898. The plaintiff himself

testified that he knew of the existence of the Violet Jane location, but offered no evidence that it had been either abandoned or forfeited. Under such circumstances it was held that he must show that the land was open to location, and having shown that a prior location existed and not showing that it had ceased, he had failed to prove the ground open to location and was properly non-suited.

In *Kirk vs. Meldrum*, 28 Colo. 453, 65 Pac. 634, the evidence offered by the plaintiff showed the existence of a prior location covering the same ground which was in possession of the defendants and did not show the lapsing or ceasing of the prior location.

So in *McWilliams vs. Winslow*, 34 Colo. 341, 82 Pac. 528, the same situation was presented. It was shown that nearly nine years before the plaintiff's location, the ground had been located by the defendant and his grantors, and nothing was shown with reference to the termination of such former location.

It is with reference to such situations that the general language used by the courts applies, and even then only where the point was distinctly urged at the trial.

In the instant case, an entirely different situation is presented. The plaintiff not only showed his own locations, but affirmatively proved that the ground was open to location by proving the termination of the rights acquired by the defendant under its locations. He not only proved valid locations by the plaintiff, but conceding that defendant's locations had existed at one time, proved that they had terminated by forfeiture, by showing the failure to file the proper affidavit and thus raising a presumption that the annual work had not been done, which presumption was not overcome.

"When plaintiff made his proof, as he did, of citizenship, and that he had made a discovery of gold-bearing quartz in the land, and had shown a location according to the requirements of the law, he established his case *prima facie*, and he was not called upon to make further proof that the land was unoccupied mineral land of the United States. It was shown to be public land, and the presumption is that all public land is unoccupied."

Goldberg vs. Bruschi, 81 Pac., p. 24, 146 Cal. 291.

Again, appellant alleges in its answer that at the time when the appellee avers that he was entitled to the possession of the premises in dispute and for several years prior thereto, *such premises were embraced within valid mining locations of the appellant, etc.* (R. p. 8.)

It follows, therefore, that if the premises in dispute were as alleged in the answer embraced in *valid mining locations* of the appellant, then the lands in dispute were of the unappropriated public domain of the United States save so far as appropriated by the appellant, for were such lands subjected to an appropriation by a third party then the locations of the appellant were invalid and not valid as alleged in the answer. The appellant is now estopped from alleging contrary to the averments in its answer.

Furthermore, the appellant requested the court to find that the lands in dispute were embraced in its mineral locations at all times from the several dates of the making of the same *and that such locations were valid*. See record page 67. And the court did in fact find as requested by the appellant that such locations were valid. Therefore, repeating what was said above, if the appellant's locations were valid at all times from the making thereof then the lands embraced therein were of the unappropriated public domain of the United States save so far as appropriated by

the appellant and the appellant is now estopped from alleging that it was not shown by the appellee that the lands were of the unappropriated public domain of the United States.

The location notice of the Hortense and Aluminum claims are made a part of the answer, and it is stated in each of them that the territory was a part of the unsurveyed public lands of the United States; and it is further alleged that the defendant holds all of the said claims under and by virtue of such original and the amended location notices.

The fact that appellant's first application for patent was not adversed by anybody and its present application by the appellee only perhaps also raises a presumption that the land was unappropriated public domain at the time of all of the locations mentioned in the complaint and the answer, except insofar as it had been located by the parties to this action.

The trial court found as a fact that the land was unappropriated public domain in April, 1905, at the time when the Lulu and Agnes claims were first located, and as a conclusion of law, that the territory covered by the locations was public domain at the time of the re-locations of the Lulu and Agnes, and the locations of the other three claims.

While this finding is denominated a conclusion of law, it is a finding of fact and will be so regarded. The Supreme Court adopted the findings of fact made by the trial court and affirmed the judgment. This particular finding of fact being among the conclusions of law was either inadvertently omitted by the Supreme Court from its statement of facts, or that court regarded it as a proper conclusion of law and as not having been made an issue by the pleadings. While the point was assigned as error to the Supreme Court the

opinion makes no reference to it. We think, therefore, that its interpretation of the pleadings and of the practice of New Mexico should not be disturbed.

Brown vs. Gurney, *Supra*, was tried upon an agreed statement of facts, one of the provisions of which was as follows:

"provided, however, that it is not admitted that at the time of said location on the ground embraced within said location was a part of the vacant and unappropriated public domain."

The election by the Kohnyo claimant of the northern end of the claim, and the abandonment of the southern end was filed on June 14th, 1898, and, under the decision of this court upon that day the land became open to location.

The Hobson's Choice location, which was upheld, was made on June 23, 1898, nine days after the ground had been thrown open to relocation. Counsel for appellant conclude their brief as follows:

"It is a matter of common knowledge in mining regions that the same land is frequently covered by several locations, and in the light of this well known fact, the omission in the plaintiff's proof must be held to be fatal."

Had this court adopted such a view in Brown vs. Gurney it would have been constrained to reverse the judgment.

Even as the Supreme Court of New Mexico did not attach sufficient importance to this point to refer to it in its opinion, so it seems that this court did not think it necessary to make reference to it. We infer that the point was raised from the statement of the following proposition, in the brief of the counsel for Gurney:

"Where a certain fact is accepted in the trial court and the trial proceeds without objection upon the as-

sumption that such fact exists, and the court decides the cause, relying upon such assumption, neither party will be heard in the court of review to question the existence of the fact," citing many cases.

The testimony and proceedings at the trial have not been certified to this court and it is questionable whether under the statute this court if they had been certified to it, would have had jurisdiction to examine them.

It is the general rule that every presumption should be indulged in favor of the correctness of the decision of the lower court. Therefore, it should be presumed that the Supreme Court which had before it such testimony and proceedings, found in them sufficient reason for paying no attention to this purely technical consideration.

VII.

THE ORIGINAL LOCATIONS OF THE HORTENSE AND ALUMINUM WERE VOID FOR THE REASON THAT THE LOCATORS WERE DUMMIES USED BY APPELLANT TO THE END THAT IT MIGHT EVADE THE UNITED STATES LAW AND LOCATE MORE THAN TWENTY ACRES OF LAND IN ONE CLAIM.

It appears by Findings I and II (R. pp. 140-1) that the original locators of the "Hortense" and "Aluminum" claims covered 160 acres each and were made by eight persons, one of whom, W. F. Robinson, appears by the verification of the answer to be President of the appellant; and by Finding IV that these locators conveyed the claims to the appellant without consideration. It is manifest that the locators, as such, were acting in the interest of the appellant.

It has been expressly held that under section 2331 of the Revised Statutes, a claim located by three persons, acting in the interest of a corporation, must be limited to twenty acres.

Gird vs. Cal. Oil Co., 60 Fed., 531.

This case has never been modified or distinguished, but has been frequently cited with approval.

When the locators have knowledge of the concealed interest, the entire location is void.

Cook vs. Klomos, 164 Fed., 529.

The facts in that case are very similar to those in ours. At page 538, the Court says:

"In *Gird vs. California Oil Co. (C. C.)*, 60 Fed., 531, 545, Judge Ross held that under section 2331, Rev. St., a claim located by three persons must be limited to 20 acres when it appears that they are in the employ and acting in the interest of a single company."

"The mineral land laws of the United States are extremely liberal in the requirements under which possessory rights may be acquired. The few restrictions imposed are only intended to prevent the primary location and accumulation of large tracts of land by a few persons, and to encourage the exploration of the mineral resources of the public land by actual bona fide locators. The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed but in excess of the limit of 20 acres, it is plainly in violation of the letter of the law, and when as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void."

VIII.

We respectfully submit that the judgment should be affirmed.

EUGENE S. IVES,
Attorney for Appellee.

EL PASO BRICK COMPANY, APPELLANT, *v.* JOHN
H. McKNIGHT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
NEW MEXICO.

No. 185. Argued January 22, 23, 1914.—Decided April 6, 1914.

Locators of mining claims have the exclusive right of possession of all the surface so long as they make the improvements or do the annual assessment work required by Rev. Stat., § 2324. To convert this defeasible possessory right into a fee simple the locator must comply with the provisions of Rev. Stat., §§ 2325, 2333.

The entry by the local land officer issuing the final receipt to a locator is in the nature of a judgment *in rem* and determines the validity of locations, completion of assessment work and absence of adverse claims.

The holder of a final receipt is in possession under an equitable title, and until it is lawfully canceled is to be treated as though the patent had been delivered to him. *Dahl v. Raunheim*, 132 U. S. 260.

While the General Land Office has power of supervision over acts of local officers and can annul entries obtained by fraud or made without authority of law, it may not arbitrarily exercise this power; and if a cancellation is made on mistake of law it is subject to judicial review when properly drawn in question in judicial proceedings.

Under the policy of the land laws the United States is not an ordinary proprietor selling land and seeking the highest price, but offers liberal terms to encourage the citizen and develop the country.

Where there has been compliance with the substantial requirements of the land laws, irregularities are waived or permission given to cure them; and so *held* that, under the circumstances of this case, as there had been proper posting under Rev. Stat., §§ 2325 and 2333, the fact that the original affidavit of posting was made before an officer residing outside the district and not within the district as required by § 2335, did not render the entry void. The defect was curable and cancellation of entry for that defect alone was improper.

The yielding of a locator holding a final receipt to an erroneous ruling does not destroy the rights with which he has become vested by full compliance with the requirements of Rev. Stat., § 2325.

Quære, whether § 2135, Comp. Laws New Mexico, imposing upon a

233 U. S.

Statement of the Case.

locator of mineral lands the burden of proving that he has performed the annual assessment work, is void as in conflict with the Federal statutes. See *Hammer v. Garfield*, 130 U. S. 29.

Quære, whether an affidavit of work offered for one purpose by an adverse claimant can be used for another purpose by the locator as substantive evidence in the case.

A locator acquires no rights by locating on property that had previously been, and then was, segregated from the public domain.

16 New Mex. 721, reversed.

In proceedings brought by McKnight to try the right of possession to conflicting mining locations, it appeared that the defendant, the El Paso Brick Company, was in possession of the Aluminum International and Hortense claims, constituting what was known as the Aluminum group of placer mines. It held under locations made prior to January, 1903. In 1905 the company decided to apply for a patent to the land which embraced about 411 acres. Accordingly, on August 2, 1905, it filed with the Register of the land office at Las Cruces, Dona Ana County, New Mexico, an application for a patent together with an affidavit (executed before an officer residing outside of the mining district) that notice of the application had been posted on the land. These papers were filed with the Register who gave the further notice required by statute. No protest or adverse claim was filed by any person. The Brick Company paid \$1027.50, being the purchase price fixed by Rev. Stat., § 2333, and on October 23, 1905, the land officers allowed an entry on which the Receiver issued a final receipt—the material portions of which were as follows:

“United States Land Office at Las Cruces, N. Mexico,

“October 23, 1905.

“Received from The El Paso Brick Company, El Paso, Texas, the sum of Ten hundred and twenty-seven and 50-100 dollars, the same being payment in full for the area embraced in that Mining Claim known as the ‘Alum-

inum Placer Group' unsurveyed . . . embracing 410.90 acres in the Brickland Mining District, in the County of Dona Ana and Territory of New Mexico, as shown by the survey thereof.

"\$1027.50. Henry D. Bowman, Receiver."

The entry and this final receipt *prima facie* entitled the Company to a patent, which however was not issued because various parties filed protests with the Land Commissioner in which it was asserted that the Brick Company's locations were originally void, or if valid, had been forfeited. It was also contended that the Company was not entitled to a patent because the affidavit showing the posting of the notice on the land had not been signed before an officer residing within the land district as provided in Rev. Stat., § 2335, which declares that "all affidavits required to be made under this chapter [mining laws] may be verified before any officer authorized to administer oaths within the land district where the claims may be situated."

Notice of these protests was given to the Brick Company which was allowed 60 days within which to show cause why the entry should not be cancelled. "In response numerous affidavits and exhibits designed to overcome the objections were filed on behalf of the Company," among which was a "supplementary affidavit with reference to such posting and such claim which was in compliance with the laws of the United States and was verified before a proper officer."

On September 4, 1906, the Commissioner ruled that the entry was fatally defective because the original affidavit as to posting had not been executed before an officer residing in the land district. From that ruling the Brick Company appealed.

There was a hearing before the Assistant Secretary of the Interior, who, on September 9, 1908, rendered a decision, 37 L. D. 155, in which,—after discussing the pro-

233 U. S.

Statement of the Case.

visions of Rev. Stat., §§ 2325, 2335, and quoting from various rulings of the Land Department and courts,—he held that the fact that the affidavit of posting had been signed before an officer residing outside of the district, was a fatal defect, which invalidated the entire proceeding. Among other things, he said (p. 159): "The defect is not a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been theretofore filed, the Register was without authority to direct the publication of the notice or otherwise proceed; and the notice, although in fact published and posted, being without the necessary legal basis, was a nullity and ineffectual for any purpose. The patent proceedings therefore fall and the entry will be canceled."

The record further recites that on November 24, 1908, the Brick Company waived its right to petition for a review of such decision and "thereupon such decision and the cancellation of said entry became final and said entry was cancelled on the records of the Land Office." On the next day, November 25, 1908, the Brick Company filed at the local land office a second application for patent. McKnight thereupon filed an adverse claim in which he set up that the land described in the Brick Company's application embraced within its limits the Lulu and Agnes claims which had been located by him in April, 1905, and relocated in May, 1906, at which time he also located the Tip Top, Lynch and Aurora claims. The patent proceedings in the Local Land Office were stayed in order that McKnight might, as provided in Rev. Stat., § 2326, bring a suit in a court of competent jurisdiction to try the right of possession.

On January 2, 1909, McKnight brought such suit in the

District of Dona Ana County, New Mexico. It was tried November 8, 1909, before a judge without a jury. At the hearing McKnight introduced the certificates of the locations described in his complaint and evidence tending to show that he had done the required assessment work on his five claims. In support of his contention that the Brick Company had forfeited its rights, by failing to do the annual assessment work, the record recites that he offered "certified copies of proof filed by the Brick Company in June, 1905, and December, 1906, for the purpose of showing, in connection with the testimony of the witness [the keeper of the county records] that there had been no satisfactory proof of labor filed for any year previous to 1906." These certified copies consisted of affidavits by the President of the Brick Company that it had done more than \$5,000 worth of work on its locations during each of the years 1903, 1904 and 1906. There was no ruling by the court limiting the effect of the affidavits as evidence, but it appears that McKnight contended that, as the names of the persons actually doing the work were not stated in the affidavit and as the first of the affidavits was made in April, 1905, the burden of showing that the work had actually been done for 1903 and 1904 was cast on the Brick Company by virtue of the provisions of § 2315 of the Compiled Laws of New Mexico.¹ The Brick Company, on

¹ "SEC. 2315. The owner or owners of any unpatented mining claim in this Territory, located under the laws of the United States and of this Territory, shall, within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character, and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be *prima facie* evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall, in any contest, suit or proceedings touching

233 U. S.

Opinion of the Court.

the other hand, appears to have contended that this territorial statute was not only void as being in conflict with the Federal statutes, but that the affidavits offered by plaintiff showed on their face that many times the amount of assessment work required had been done in 1903, 1904 and 1906, thus segregating the land from the public domain and rendering McKnight's subsequent locations nugatory.

At the conclusion of the evidence the court took the case under advisement and on December 17, 1909, rendered a judgment for McKnight which was affirmed (16 New Mex. 721) by the Supreme Court of New Mexico. The case was then brought here on appeal.

Mr. Francis W. Clements, with whom *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. W. A. Hawkins* and *Mr. John Franklin* were on the brief, for appellant.

Mr. Eugene S. Ives for appellee.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

McKnight brought suit against the El Paso Brick Company to try the right of possession to conflicting mining locations. In his complaint he asserted his own title and attacked that of the Defendant under locations older in date but which he claimed had been forfeited by failure to do the annual assessment work for 1903 and 1904, thereby leaving the land open to the locations made by McKnight in 1905 and 1906. The Brick Company, while insisting that the plaintiff's own evidence proved that the assess-

the title to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

ment work had in fact been fully performed, relied on the legal effect of the company's application for a Patent to the land and the final receipt issued to it by the Receiver of the Local Land Office in October, 1905. To this the plaintiff replied that the entry, on which the receipt issued, had been cancelled on the ground that the patent proceedings were absolutely void because the statutory affidavit of posting had not been filed.

1. Locators of mining claims have the exclusive right of possession of all the surface included within the exterior limits of their claims so long as they make the improvements or do the annual assessment work required by the Revised Statutes, § 2324. The law, however, provides (Rev. Stats., §§ 2325, 2333) a means by which the locator can pay the purchase price fixed by statute and convert the defeasible possessory title into a fee simple. Sixty days' notice must be given in order that all persons having any adverse claim may be heard in opposition to the issue of a patent. That notice is threefold. It must be given by publication in the nearest newspaper, by posting in the Land Office, and by posting on the land itself, and it is provided in the statute that this latter fact may be proved by the affidavit of two persons before an officer residing within the land district (Rev. Stat., § 2335). All persons having adverse claims under the mining laws may be heard in objection to the issuance of a patent. But (§ 2325) "if no adverse claim shall have been filed . . . it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third persons to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter" [relating to mineral lands].

2. In the present case the Brick Company's application for a patent was filed, each of the several forms of notice

233 U. S.

Opinion of the Court.

required by statute was given, no adverse claim was filed, the purchase price was paid to the Government, and a final receipt was issued by the local land office. The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem* (*Wight v. Dubois*, 21 Fed. Rep. 693) and determined that the Brick Company's original locations were valid and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claim existed and that the Brick Company was entitled to a patent.

From that date, and until the entry was lawfully cancelled, the Brick Company was in possession under an equitable title, and to be treated as "though the patent had been delivered to" it. *Dahl v. Raunheim*, 132 U. S. 260, 262. And, when McKnight instituted possessory proceedings against the Brick Company, the latter was entitled to a judgment in its favor when it produced that final receipt as proof that it was entitled to a patent and to the corresponding right of an owner.

Nor should the result have been different when the record showed that the entry and final receipt, properly issued, had been improperly cancelled. It is true that the order of the Department was a denial of the patent, but it was not a conclusive adjudication that the Brick Company was not entitled to a patent, nor could such an order deprive the Brick Company of rights vested in it by law. For while the General Land Office had power of supervision over the acts of the local officers, and could annul entries obtained by fraud or made without authority of law, yet if the Department's cancellation was based upon a mistake of law, its ruling was subject to judicial review when properly drawn in question in judicial proceedings, inasmuch as the power of the Land Office is not unlimited nor can it be arbitrarily exercised so as to deprive any person of land lawfully entered and paid for. *Cornelius v.*

Kessel, 128 U. S. 456, 461; *Parsons v. Venzke*, 164 U. S. 89.

3. So that the case involves a determination of the single question as to whether the patent was properly refused by the Land Department because of the objection that the Brick Company had failed to comply with the terms of the law relating to Mineral Land. Rev. Stat., § 2325. That can be determined by an inspection of the record, in which the order appears. It shows that the cancellation of the entry was not based on the Brick Company's failure to do the annual assessment work, or to give the proper notice, or to pay the statutory price, but solely for the reason that the affidavit of posting was executed before an officer who resided outside of the land district.

That decision (37 L. D. 155), though supported by some Departmental rulings of comparatively recent date, was in conflict with the established practice of the Land Department, and was expressly and by name overruled, on July 29, 1911, in *Ex parte Stock Oil Company*, 40 L. D. 198, which reaffirmed prior decisions to the effect that irregularities in proof, including the execution of affidavits before other than the designated officers, might be supplied, even on appeal.

These and similar rulings, previously followed in the Department, are manifestly correct. They accord with the policy of the land laws, under which the United States does not act as an ordinary proprietor seeking to sell real estate at the highest possible price, but offers it on liberal terms to encourage the citizen and to develop the country. The Government does not deal at arm's length with the settler or locator and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs. *United States v. Marshall Mining Co.*, 129 U. S. 579, 587. In

233 U. S.

Opinion of the Court.

the present case such proof by supplemental affidavits, properly executed, showed that the land had been properly posted. But that fact was not allowed to have any effect because of the mistaken view that, as the original affidavit of posting had been signed before an officer residing outside of the land district, the patent proceedings were absolutely void. This confused service by proper posting—which was jurisdictional,—with defective proof of such service which—like the defective return of an officer,—could be corrected. Under the law, jurisdiction depended upon giving notice by publication in a newspaper, by posting in the land office, and by posting on the land itself,—the statute directing how the giving of such notice should be proved. But irregularities in complying with such directory provision could be cured, and when cured, as it was here, the patent should have been issued. The cancellation of the entry was based on a plain error of law, and though there was no appeal in fact, and no right of appeal to the courts, the ruling did not operate to deprive the Brick Company of its property in the mines. The fact that the Brick Company, perforce, yielded to the erroneous ruling, and instituted new proceedings in order to secure a patent, as evidence of its title, did not destroy the rights with which the Company had become invested by full compliance with the requirements of Rev. Stat., § 2325. When, therefore, in the suit to try the right of possession the plaintiff asked that proper effect be given to the final receipt and the entry on which it was based as a judgment *in rem*, it was not making, as is contended, a collateral attack on the order of the Land Department, but was merely relying on the valid entry and asking the court to decline to give effect to the erroneous cancellation.

4. This conclusion makes it unnecessary to decide the question as to whether the territorial statute, imposing upon the locator the burden of proving that he has performed the annual assessment work, is void as being in

conflict with the Federal statutes, which require no such annual proof, raise no presumption of abandonment and as construed in *Hammer v. Garfield*, 130 U. S. 291, demand clear and convincing proof that work has not been done before a forfeiture can be declared. It also makes it unnecessary to determine whether the affidavit of work being offered for one purpose by McKnight could be used for another purpose by the Brick Company as substantive evidence in the case.

Many pages of the briefs are devoted to a discussion of these questions, but if any of them were decided in favor of the Brick Company it could not increase its rights. If the legal propositions involved could be decided in favor of McKnight that could not overcome the fact that the issuance of the final receipt to the Brick Company on October 23, 1905, was an adjudication not only that the Brick Company was entitled to a patent, but that McKnight then had no adverse claim to the land. Of course he acquired none in May, 1906, by locating on property that had previously been and then was segregated from the public domain.

The judgment of the Supreme Court of the Territory of New Mexico is reversed and the case is remanded to the Supreme Court of the State of New Mexico for further proceedings not inconsistent with this opinion.

Reversed.